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5-24-02  
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IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA

ALLFIRST BANK,

Plaintiff,

v.

JOHN M. ORTENZIO,

Defendant.

FILED  
HARRISBURG, PA  
MAY 23 2002  
CASE NO. 1:01-CV-786  
Per J. E. D'AMICO  
CLERK

**DEFENDANT'S REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT AND BRIEF IN  
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Defendant, John M. Ortenzio ("Mr. Ortenzio"), submits this reply brief in further support of Defendant's motion for summary judgment and brief in opposition to Plaintiff's motion for summary judgment. In its Complaint, Allfirst Bank ("Allfirst") seeks to hold Mr. Ortenzio personally liable for the corporate obligations of CCI Construction Co., Inc. ("CCI") by bypassing the clear language of the contract between Allfirst and Mr. Ortenzio. Allfirst's claims fail, and Mr. Ortenzio is entitled to summary judgment, as Mr. Ortenzio is not personally liable for any amount owed by CCI on the \$4 million Line of Credit. Furthermore, Allfirst cannot establish that the manner in which CCI paid its contractual obligation was prohibited by the loan documents.

**I. THIS CASE IS A BREACH OF CONTRACT CASE**

**A. Allfirst Has Sued on a Breach of Contract Theory.**

In its Memorandum of Law in Opposition to Ortenzio's Motion for Summary Judgment ("Allfirst's Memorandum in Opposition"), Allfirst claims that this case is not a breach of contract case and no interpretation of contracts is involved. Allfirst's Memorandum in

Opposition at 9. This flies in the face of the allegations pled by Allfirst in its Complaint and is contrary to Allfirst's statement in its Motion in Limine.

In Count One of its Complaint, Allfirst alleged the following:

"Because the One Million Two Hundred Thousand Dollar loan from Allfirst to CCI was never paid or discharged in full, the obligation of Ortenzio, as guarantor and surety and co-obligor with respect to the One Million Two Hundred Thousand Dollar loan and the Commercial Note, was never discharged or satisfied, such that Ortenzio remains liable under the Suretyship Agreement for all sums owed by CCI pursuant to the One Million Two Hundred Thousand Dollar loan and the Commercial Note." Allfirst's Complaint, ¶ 29.

These allegations sound in contract, not equity. Allfirst claims that CCI breached its obligation under the Commercial Note and that Mr. Ortenzio breached his obligation under the Suretyship Agreement. Similarly, in its Motion in Limine, Allfirst acknowledges that: "The Court is fully capable of reviewing the loan documents and interpreting the terms and provisions of the loan documents on its own." Allfirst's Memorandum of Law in Support of its Motion in Limine at 6. In addition, in its Memorandum in Opposition, Allfirst argues that CCI's repayment of the \$1.2 million short-term note from the \$4 million line of credit was an unauthorized use by CCI of the line of credit because it was precluded by the loan documents. Allfirst's Memorandum in Opposition at 9-12.<sup>1</sup> In essence, Allfirst is alleging that CCI and Mr. Ortenzio breached their contractual obligations with Allfirst. Indeed, as the rights and obligations as between Allfirst and Ortenzio are set forth in the Suretyship Agreement, Allfirst's claims against Mr. Ortenzio must sound in contract, not equity.

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<sup>1</sup> Interestingly, while claiming that this case does not involve breach of contract or interpretation of contracts, Allfirst relies upon the testimony of Sheri Phillips and her interpretation what she believed was prohibited by the loan documents. Allfirst's Memorandum in Opposition at 3-4. Of course, it is only the Court, and not Ms. Phillips, that can interpret the loan documents.

**B. Conditional Payment is Not a Cause of Action.**

Allfirst claims that this case “falls squarely into the conditional payment rule.” Allfirst’s Memorandum of Law in Support of its Motion for Summary Judgment at 9. However, in the cases cited by Allfirst in support of this theory, the underlying causes of action were breach of contract, not equity. See, Citizens’ Bank of Wind Gap v. Lipschitz, 296 Pa. 291, 145 A. 831 (1929) (bank brought action against defendant on a note); First Pennsylvania Bank v. Triester, 251 Pa. Super. 372, 380 A.2d 826 (1977) (bank brought action on promissory note); Mechanics National Bank of Burlington v. Kielkopf, 22 Pa. Super. 128 (1903) (assumpsit action on a promissory note).

Further, the cases relied on by Allfirst are merely novation cases, where the ultimate issue was whether it was the parties’ intention that a later agreement replace the original agreement. See, Citizens’ Bank, 296 Pa. at 293, 145 A. at 831 (when original note became due, renewal note was signed and delivered to bank by same maker); First Pennsylvania Bank, 215 Pa. Super. at 375-376, 380 A.2d at 827-28 (bank agreed to extension of time to repay additional note and renewal note was executed by defendants); Mechanics National Bank, 22 Pa. Super. at 129 (original note became due and instead of payment in full, bank received renewal notes).

The cases cited by Allfirst in support of its novel conditional payment theory in no way relate to the facts of this case. Here, no new note was offered and no agreement was made between Allfirst, CCI or Mr. Ortenzio that a new obligation would replace the Surety Agreement. Rather, the ultimate issue in this case is whether CCI’s payment of the \$1.2 million short-term note by writing a check that caused a draw on the line of credit constituted a breach of contract between Mr. Ortenzio and Allfirst. The answer to that question is “no.”

**C. Mr. Ortenzio Did Not Breach Any Agreement With Allfirst.**

Despite the fact that Allfirst has pled a breach of contract action, Allfirst now claims to be seeking to “nullify the effect of the purported payment [by CCI] under theories of conditional payment, equitable subrogation and fraud.” Allfirst’s Memorandum in Opposition at 9. Yet, realizing that relying on the loan documents will limit Allfirst’s recovery to suing CCI for breach of contract, Allfirst switches tactics and claims that this is a suit in equity. Since Allfirst cannot establish that CCI’s repayment violated any of the terms of the short-term note, CCI cannot maintain a cause of action for breach of contract and thus, summary judgment should be entered in favor of Mr. Ortenzio on Count One.

**1. Payment of the \$1.2 Million Short-Term Note Was Not a Conditional Payment Because it Was Not Prohibited By the Loan Documents.**

Although Allfirst argues that CCI’s payment of the \$1.2 short-term note was “conditional” because repayment was made from an unauthorized source of funds, the evidence is to the contrary. There is no document between the parties that specifies the source of funds for repayment. See, Exhibits “B” and “C” to Allfirst’s Complaint. Furthermore, Mr. Schwartz, Allfirst’s loan officer, admitted that no such document exists:

**Q: Is there any document that deals with how the, how the loan is to be repaid specifically?**

**A: No.**

**Q: Is there any document that specifically states that it cannot be repaid by writing a check on CCI’s business account, checking account?**

\*\*\*

**A: Not specifically.**

Schwartz Dep. at 144:8 – 144:17 (emphasis added). Mr. Schwartz further acknowledged

that Allfirst was not precluded from negotiating a provision limiting the source of repayment:

Q: Are you aware of any reason why the bank couldn't put in the commitment letter for the 1.2 million or in the 1.2 million dollar note or in the 1.2 million dollar suretyship an express prohibition that that facility could not be repaid by drawing down on the four million dollar line of credit?

A: There's no reason the bank could not have done that.

Schwartz Dep. at 147:1 – 147:9. Moreover, Mr. Schwartz admitted that neither CCI nor Mr. Ortenzio were limited regarding the source of funds to repay the short-term note:

Q: Is there any document signed and made binding on Mr. Ortenzio or CCI that limited the repayment of the 1.2 million dollar note from excess cash flow?

A: No.

Schwartz Dep. at 203:3 – 203:7. Finally, Mr. Schwartz testified that although there were negative covenants in the loan documents, which imposed prohibitions on CCI and Mr. Ortenzio, none of those negative covenants prohibited repayment of the loan from the line of credit:

Q: And the loan commitment and/or the note contains loan – negative covenants, correct?

A: Yes.

Q: Okay. And the bank could have put in a negative covenant that prohibited the repayment of the 1.2 million from the four million dollar line of credit, is that correct? Nothing prohibited that, right?

A: Nothing prohibited that.

Schwartz Dep. at 147:16-148:3.

In addition, according to Allfirst, the line of credit was to be used solely to finance accounts receivable and work in process. Allfirst's Memorandum in Opposition at 3. Allfirst

relies heavily on the fact that CCI's use of its \$4 million line of credit was restricted by the terms of the commitment letter. Initially, it should be noted that when Allfirst initiated this action on the \$4 million Line of Credit, it did not identify the Commitment Letter as being part of the \$4 million Line of Credit, nor was the Commitment Letter attached to the Complaint evidencing this loan. See Complaint at paragraph 6 and Exhibit "A". Moreover, Allfirst fails to mention that the \$1.2 million short-term note was used for the same purpose – financing accounts receivable and work in process. Ortenzio Dep. at 86; Schwartz Dep. at 145. Mr. Schwartz admitted that as far as he was aware, CCI did not use the proceeds of the \$1.2 million short-term note for any purpose other than financing accounts receivable and work in progress:

Q: Prior to the repayment of the 1.2 million dollar note in February, on February 11, 2000, were you aware of CCI ever using the 1.2 million dollar loan proceeds for any other purpose . . . Other than to finance accounts receivable and work in progress, prior to the repayment?

A: I am not aware of any.

Schwartz Dep. at 145:3 – 145:10. Most importantly, Mr. Schwartz admitted that when CCI repaid the \$1.2 million short-term note by writing a check on the line of credit, CCI had sufficient availability of funds under the line of credit:

Q: Now, at the time of repayment of the 1.2 million coincidently in February 2000, the balance on the four million dollar line of credit allowed for the repayment of the 1.2 from the four million; is that correct?

\*\*\*

A: Yes.

Schwartz Dep. at 200:12 – 201:4. Thus, CCI's repayment of the note by using the line of credit did not violate the terms of the commitment letter and as such, does not establish that CCI

or Mr. Ortenzio breached their agreements with Allfirst.<sup>2</sup>

**2. The Line of Credit Was the Only Source of Funds From Which CCI Could Repay the \$1.2 Million Short-Term Note.**

The commitment letter that Allfirst relies so heavily upon also required that CCI establish and maintain its primary business deposits at Allfirst. See Exhibit "B" to Allfirst's Motion for Summary Judgment, at p. 2. Consistent with this requirement, CCI deposited all funds received from customers into this account. Ortenzio Dep. at 62; Phillips Dep. at 65-66. In addition, Mr. Schwartz acknowledged:

Q: Where were the bank's profits to be deposited, as far as you're concerned?

A: The bank's?

Q: CCI's profits, to be deposited, as far as you're concerned?

A: In their deposit account.

Q: Okay. And where was revenues from cash flow to be deposited from CCI? In the bank's checking account as well?

A: Yes.

Schwartz Dep. at 67:1 – 67:11. Mr. Schwartz further clarified how the cash management system worked:

Q: And, again, my question is, just so I understand the mechanism of the cash management facility, that any checks written from CCI's account with the bank would increase the four million dollar line of credit borrowings, is that correct?

A: Yes.

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<sup>2</sup> Moreover, although CCI did not violate the terms of the \$4 million Line of Credit by paying off the \$1.2 million short-term note in the manner it was paid, Mr. Ortenzio cannot be held liable for breach of the terms of the \$4 million Line of Credit because Mr. Ortenzio was not a party to that agreement. Accordingly, even if CCI violated the terms of the \$4 million Line of Credit, Allfirst's cause of action must be against CCI, not Mr. Ortenzio.

Q: And so far as you know, CCI had no business accounts elsewhere?

A: As far as I know, they did not.

\* \* \*

Q: All right. I'm CCI and I want to pay a bill. I collect my money from a customer, I put it in the account, and I want to pay another bill – I want to pay a bill, but I don't want it to draw on the line of credit, four million dollar line of credit. How – could I do that?

A: I don't think so.

Schwartz Dep. at 142:12 – 143:12.<sup>3</sup> However, if Allfirst is to be believed, CCI had to deposit all profits and revenues at Allfirst but could not use those funds to repay CCI's 1.2 million short-term note. That CCI or Mr. Ortenzio would agree to such terms defies logic. Rather, what does make sense is what was actually agreed -- that Allfirst would extend an additional \$1.2 million in credit to CCI on a short-term basis with no restrictions on the source of funds to repay the short-term note.

**D. Allfirst is Seeking to Hold Mr. Ortenzio Liable on the \$4 Million Line of Credit and Enforce Rights for Which it Did Not Negotiate.**

Despite CCI's payment of the \$1.2 million short-term note, Allfirst is attempting to extend Mr. Ortenzio's liability to the \$4 million line of credit, which Mr. Ortenzio did not

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<sup>3</sup> The deposition transcript of Mr. Schwartz is attached to Defendant's Motion for Summary Judgment as Exhibit "B". Mr. Schwartz' testimony is consistent with Mr. Ortenzio's testimony that when he wrote the check to pay the \$1.2 short term note, he did not know whether the funds would be drawn against the line of credit. Mr. Ortenzio testified as follows:

Q: And you knew that writing that check would increase the outstanding balance on the line of credit?

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A: That would depend on whether or not there were funds sitting in our account that would not have been swept by the bank and their cash management system. So to the extent there were funds prior to that, then I guess there would have been a zero impact.

Ortenzio Dep. at 113:6-113:22, attached hereto as Exhibit "A".



guaranty. In fact, during negotiations, Allfirst proposed to extend the existing line of credit by \$1 million with Mr. Ortenzio's guaranteeing the entire \$5 million but Mr. Ortenzio refused. Schwartz Dep. at 68-69. Allfirst then agreed that Mr. Ortenzio would only guarantee the \$1.2 million short-term note. Schwartz Dep. at 69

By claiming that CCI's payment of the \$1.2 million short-term note was a "conditional payment," and seeking to nullify such payment, Allfirst is attempting to get what it did not obtain in the loan documents – Mr. Ortenzio's guarantee on the \$4 million line of credit. However, the Court cannot rewrite the terms of the agreement merely because Allfirst now believes in hindsight it made a bad deal. See, Glen-Gery Corp. v. Wargel Constr. Co., 734 A.2d 926, 929 (Pa. Super. 1999) (stating court may not rewrite terms of contract nor give them meaning that conflicts with the language used); Tudor Dev. Group Inc. v. United States Fidelity & Guar. Co., 968 F.2d 357, 363 (3<sup>rd</sup> Cir. 1992) (finding no reason for court to exercise its equitable powers to rewrite the contract between the parties and give one party more security than it bargained for).

Consequently, as Allfirst cannot establish that Mr. Ortenzio violated the terms of the Suretyship Agreement and as this Court cannot rewrite the terms of the Suretyship Agreement to give Allfirst what it did not bargain for, summary judgment should be entered in favor of Mr. Ortenzio on Count One of Allfirst's Complaint.

## **II. THE DOCTRINE OF EQUITABLE SUBROGATION IS NOT APPLICABLE**

In its Memorandum in Opposition, Allfirst claims that it is not suing Mr. Ortenzio in quantum meruit but rather for equitable subrogation. Allfirst's Memorandum in Opposition at 12. However, this restatement of its cause of action by Allfirst ignores what was pled in its Complaint. In its Complaint, Allfirst alleged:

Because CCI and Ortenzio used the proceeds of the revolving line of credit of CCI with Allfirst to repay the One Million Two Hundred Thousand Dollar loan without Allfirst's knowledge or consent and **because Ortenzio was unjustly enriched thereby, Allfirst, as creditor under the revolving line of credit, is equitably subrogated to the rights of Allfirst as creditor under the One Million Two Hundred Thousand Dollar loan**, including through such equitable subrogation the right to enforce and collect upon the Suretyship Agreement executed by Ortenzio.

Allfirst's Complaint, ¶24. Despite its claim in its Memorandum in Opposition, Count Two of Allfirst's Complaint alleges that Mr. Ortenzio was unjustly enriched and seeks the remedy of equitable subrogation. This is a cause of action for quantum meruit, which is inappropriate due to the fact that it is undisputed that the parties' relationship was defined by a contract. See, Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 998-99 (3<sup>rd</sup> Cir. 1987) (stating that a claim for the quasi-contractual doctrine of unjust enrichment will not lie when the relationship between the parties is based upon a written agreement or express contract); Halstead v. Motorcycle Safety Foundation, Inc., 71 F. Supp.2d 455 (E.D. Pa. 1999) (the finding of a valid contract prevents a party from recovering for unjust enrichment); Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. 1999)(a court may not make a finding of unjust enrichment where a written or express contract exists); Birchwood Lakes Communtiy Ass'n v. Com., 296 Pa. Super. 77, 442 A.2d 304, 308 (1982) (plaintiff cannot recover on a claim for unjust enrichment if such claim is based on breach of a written contract).

**A. Even if Allfirst Had Properly Pled a Cause of Action for Which Equitable Subrogation Was an Available Remedy, Allfirst Has Not Established that Such a Remedy Is Applicable Here.**

In the cases cited by Allfirst in support of its claim for equitable subrogation, the

underlying causes of action were either in tort or equity but not contract.<sup>4</sup> See, Potoczny to Use of City of Philadelphia v. Vallejo, 170 Pa. Super. 377, 85 A.2d 675 (1952) (plaintiff brought suit in trespass to recover for personal injuries); In re McGrath's Estate, 159 Pa. Super. 78, 46 A.3d 735 (1946) (suit in equity seeking subrogation as remedy for unjust enrichment); In re McCahan's Estate, 312 Pa. 515, 168 A. 685 (1933) (suit in equity); Gildner, Trustee v. First National Bank and Trust Company of Bethlehem, 342 Pa. 145, 19 A.2d 910 (1941) (action for negligence).

Moreover, under Pennsylvania law, the following prerequisites must be established by the party seeking equitable subrogation: "(1) the claimant paid the creditor to protect his own interests; (2) the claimant did not act as a volunteer; (3) the claimant was not primarily liable for the debt, i.e. secondary liability; (4) the entire debt has been satisfied; (5) allowing subrogation will not cause injustice to the rights of others." Tudor Dev. Group, Inc. v. United States Fidelity & Guar. Co., 968 F.2d 357 (1992). Allfirst cannot establish all of the required elements.

First, Allfirst (under the \$4 million line of credit) cannot establish that it accepted the \$1.2 million payment in order to protect its own interests. In fact, the opposite would be true. In order to adequately protect itself, Allfirst (under the \$4 million line of credit) should have rejected the \$1.2 million payment, because it knew that the \$4 million line of credit was not secured by Mr. Ortenzio's guarantee. Second, Allfirst (under the \$4 million line of credit) cannot establish that it paid the \$1.2 million short-term note because it was secondarily liable on

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<sup>3</sup> In its Memorandum in Opposition, Allfirst claims that the type of equitable subrogation it is seeking is known as "legal subrogation," which is not dependent upon an actual or implied contract. Allfirst's Memorandum in Opposition at 12. However, the cases cited by Allfirst in support of this assertion are not Pennsylvania cases, but rather Maryland state court cases. It is undisputed that Pennsylvania law is controlling in this case. As Allfirst has not cited any Pennsylvania case adopting the law of equitable subrogation as defined under Maryland law, the Court should disregard Allfirst's claim that legal subrogation is applicable here.

the note. That is simply not the case. Allfirst had no liability on the \$1.2 million short-term note. Allfirst (under the \$4 million note) is only now claiming that it is entitled to be equitably subrogated to the rights of Allfirst (under the \$1.2 million short-term note) because it cannot sue CCI due to its bankruptcy filing. However, equitable subrogation is **not** the appropriate remedy.

**B. Allfirst Has an Adequate Remedy at Law.**

Additionally, even if Allfirst were able to establish the required elements of equitable subrogation, an equitable remedy is not appropriate when an adequate remedy at law exists. Tudor Dev. Group, 968 F.2d at 364 (citing Clark v. Pennsylvania State Police, 496 Pa. 310, 436 A.2d 1383, 1385 (1981)). See also, Redmond Finishing Co., Inc. v. Ginsburg, 301 Pa. Super. 51, 446 A.2d 1330 (dismissing action in equity because plaintiff had earlier elected to proceed at law for monetary damages). “In determining whether a remedy is ‘adequate,’ [the court] must look to its availability and not to the likelihood of success.” Tudor Dev. Group, 968 F.2d at 364.

Here, other remedies are available to Allfirst. For example, Allfirst may proceed with its breach of contract claim against Mr. Ortenzio or it may file a claim against CCI in the bankruptcy proceedings. Regardless of Allfirst’s likelihood of success under either option, the availability of these options prevents Allfirst from recovering through equity. Consequently, summary judgment on Count Two of Allfirst’s Complaint should be entered in favor of Mr. Ortenzio, as Allfirst cannot establish the required elements of equitable subrogation and because the availability of adequate remedies at law bars equitable relief.

**III. ALLFIRST CANNOT ESTABLISH THE ELEMENTS OF FRAUD.**

In order to prove fraud, Pennsylvania law requires that the plaintiff establish the following elements: (1) a representation; (2) which is material to the transaction at hand; (3)

made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. See, Lind v. Jones, Lang LaSalle Americas, Inc., 135 F. Supp.2d 616, 620 (E.D. Pa. 2001) (citing Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994); Gruenwald v. Advanced Computer Applications, 730 A.2d 1004, 1014 (Pa. Super. 1999)). Additionally, these elements must be proven by clear and convincing evidence, not the lesser preponderance of the evidence standard. Lind, 135 F. Supp.2d at 621. Allfirst cannot establish all of the required elements by clear and convincing evidence.

**A. Mr. Ortenzio Did Not Conceal the Source of Funds.**

In order to recover under their fraud claim, Allfirst must establish that Mr. Ortenzio made a false statement upon which Allfirst relied. According to Allfirst, Mr. Ortenzio's failure to specifically state to someone from Allfirst that payment was being made by drawing on the line of credit, when Mr. Ortenzio personally delivered a check drawn on CCI's line of credit with Allfirst, amounts to a false statement. This argument makes no sense for the following reasons:

First, any employee from Allfirst who came into contact with the check could easily determine the source of funds as it was written on an Allfirst check on which the account number of the line of credit appears. A true and correct copy of CCI check made payable to Allfirst is attached hereto as Exhibit "B" Second, if Mr. Ortenzio were trying to conceal the source of funds, he would not have called the bank before delivering the check nor would he have attempted to deliver the check to Mr. Schwartz personally. Ortenzio Dep. at 108 – 111.<sup>5</sup> Third,

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<sup>5</sup> In its Summary Judgment Memorandum, Allfirst claims that Mr. Ortenzio promised not to write any additional check on the line of credit at the February 18 meeting. Allfirst's Summary Judgment Memorandum at 8-9. This is

Mr. Schwartz testified that Mr. Ortenzio never made any direct representation that the \$1.2 million would not be paid from the \$4 million line of credit and also testified that he did not investigate the source of funds because he did not care. Schwartz Dep. at 163. Finally, the loan documents did not prohibit CCI from using the line of credit to pay the short-term note nor did the loan documents require that any representation be made by Mr. Ortenzio or CCI to Allfirst regarding the source of funds prior to repayment. See, Exhibits "B" and "C" to Allfirst's Complaint.

**B. Mr. Ortenzio Did Not Commit Fraud By Paying the Short-Term Note Before the Line of Credit.**

In its Summary Judgment Memorandum, Allfirst argues that Mr. Ortenzio "prepaid" the short-term note as part of his plot to deceive Allfirst. This argument ignores the reality of the situation. The due date on the short-term note was determined by Allfirst and was set for one month before the line of credit renewal date. Ortenzio Dep. at 88-90; Schwartz Dep. at 200. Further, although the due date on the \$1.2 million short-term note was March 31, 2000, Mr. Ortenzio originally proposed only a 90-day term and never wanted the obligation to extend past February 2000. Ortenzio Dep. at 88-89, 92; Schwartz Dep. at 200. However, Allfirst determined that the time period would be from November 1999 to March 2000. Ortenzio Dep. at 92-93. Regardless of the actual due date, both Allfirst and Mr. Ortenzio were aware that the short-term note would be paid before the \$4 million line of credit expired on April 30, 2000. Ortenzio Dep. at 104; Schwartz Dep. at 73. In fact, Mr. Schwartz testified as follows:

Q: Did the bank provide any documents that were signed that required repayment of the four million before the 1.2 million?

A: Not specific to that fact.

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simply not true. None of the testimony cited by Allfirst even mentions any such promise being made.

Q: How about generally to that fact?

A: No, no documents.

Q: Okay, there's no document that require the repayment of the four million prior to the 1.2 million were there?

A: No.

Schwartz Dep. at 73:6 – 73:15. Thus, CCI's payment of the short-term note before the expiration of the line of credit was not part of some plan to deceive Allfirst but rather was consistent with the parties' agreement. Because Allfirst cannot establish the required elements of fraud, summary judgment should be entered in favor of Mr. Ortenzio on Count Three of Allfirst's Complaint.

### CONCLUSION

Based upon the forgoing reasons, Defendant, John M. Ortenzio, respectfully requests that this Honorable Court enter summary judgment in his favor and deny the Motion for Summary Judgment submitted by Plaintiff, Allfirst Bank.

Respectfully submitted,  
BLANK ROME COMISKY & McCAULEY LLP

BY: 

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Dated: May 22, 2002

Exhibit A

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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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ALLFIRST BANK,

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Plaintiff

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vs.

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JOHN M. ORTENZIO,

:

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Defendant

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NO. 1:01-CV-786

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February 11, 2002

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Oral Deposition of JOHN M. ORTENZIO,  
taken pursuant to notice, was held at Cunningham  
and Chernicoff, 2320 North 2nd Street, Harrisburg,  
Pennsylvania 17110, beginning at 1:40 p.m., on the  
above date, before Donna L. Crossan, an Approved  
Registered Professional Reporter and Notary Public  
in and for the Commonwealth of Pennsylvania.

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15

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2 18 Personal financial statement 95  
dated December 31, 1998

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4 19 Security agreement dated 11-8-99 97

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13 23 CCI Construction Balance Sheet 135

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15 24 Cash flow projections 135

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20 27 Compilation of letters dated 177

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22 28 Compilation of letters dated 177

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2 Testimony of: John M. Ortenzio

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4 By Mr. Gebhardt ..... 6

5 By Mr. Burke ..... --

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## 7 EXHIBITS

8 ---

9 EXHIBIT NUMBER DESCRIPTION PAGE MARKED

10 1 Letter dated July 6, 1998 16

11 2 Letter dated December 7, 1992 29

12 3 Commitment letter dated June 12, 1992 31

13 4 Letter dated October 14, 1993 32

14 5 Commitment letter dated July 21, 1994 36

15 6 Letter dated June 14, 1995 38

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7 Request for Production of Documents

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9 NONE

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11 Stipulations

12 Page Line Page Line Page Line

13 NONE

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16 Question Marked

17 Page Line Page Line Page Line

18 NONE

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## 1 STIPULATION

2 It is hereby stipulated and agreed  
3 by and between counsel for the respective parties  
4 that reading, signing, sealing, certification, and  
5 filing are waived and that all objections, except  
6 as to the form of the question, be reserved until  
7 the time of trial.

8 ---

9 JOHN M. ORTENZIO, after having been  
10 first duly sworn, was examined and testified as  
11 follows:

12 ---

## 13 EXAMINATION

14 ---

15 BY MR. GEBHARDT:

16 Q Mr. Ortenzio, prior to the filing  
17 by CCI Construction of its Chapter 11 bankruptcy  
18 petition in May of 2000, what was your position  
19 with the company?

20 A President.

21 Q Were you also a shareholder?

22 A Yes.

23 Q Were you also a member of the  
24 Board of Directors?

7

1 A Yes.

2 Q Were there any other members of  
3 the Board of Directors?

4 A No, I don't believe so.

5 Q How long had you been president  
6 of CCI Construction?

7 A Since its inception.

8 Q Which was what year?

9 A Somewhere in 1986, '87.

10 Q And I take it you were the sole  
11 shareholder for the entire period of time?

12 A Yes.

13 Q Were you the sole director for  
14 the entire period of time?

15 A Yes.

16 Q In the year 2000, would you  
17 describe what your duties consisted of as  
18 president of CCI?

19 A 2000, I was the president of the  
20 company, so, therefore, responsible for the --  
21 ultimately responsible for the company itself.

22 Q Your day-to-day activities  
23 consisted of what kind of tasks?

24 A Day-to-day my activities in 2000

8

1 were, I would say, primarily the more strategic  
2 planning of the company, or related more so to  
3 that as opposed to -- well, to the strategic  
4 planning, overall goals of the company from a work  
5 standpoint.

6 Q So you were not directly involved  
7 in the day-to-day tasks of the company?

8 A Meaning?

9 Q Well, meaning such things as  
10 bidding the jobs or seeing that there were  
11 adequate employees on hand, that sort of thing?

12 A With respect to bidding the jobs,  
13 I reviewed the strategies for the bids prior to  
14 any bids being submitted, had meetings with  
15 individuals in the company to discuss the -- what  
16 the type of job, I'll say what the strategy was in  
17 terms of obtaining a job, what the nature of the  
18 job was, type of work.

19 Q Would that type of activity, the  
20 strategy activity have been consistent with other  
21 functions or areas of the company's operation, and  
22 for instance, hiring people, deciding what lines  
23 of business you were going to go in?

24 MR. BURKE: Are you still on

9

1 2000?

2 MR. GEBHARDT: Yes.

3 A As far as hiring individuals, if  
4 they were -- somebody was going to be in  
5 management, I would review the resume. Depending  
6 on the position, I might meet with them. Prior to  
7 that I would have had a meeting to determine  
8 whether or not we had the need for that position,  
9 whether replacing somebody or a new position.

10 BY MR. GEBHARDT:

11 Q Were your duties for CCI, as you  
12 described for the year 2000, consistent over the  
13 term of the corporation's existence?

14 A Starting from when?

15 Q When it was first created in  
16 1986, 1987.

17 A No.

18 Q Describe how they may have  
19 changed over the years.

20 A When the company started there  
21 was only myself, probably one other employee to  
22 start with and by the time 2000 came around, it  
23 was probably myself and probably a couple hundred  
24 individuals.

10

1 Q Was there a particular point in  
2 time when you became more involved in the strategy  
3 direction of the company?

4 A It tended to evolve over time.

5 Q I understand that, but would  
6 there be a point in time when your involvement was  
7 more strategic than what I'll call day-to-day  
8 operational?

9 MR. BURKE: Objection to the  
10 form.

11 A Could you be a little more  
12 specific?

13 BY MR. GEBHARDT:

14 Q At what point in time did the  
15 majority of your activities focus on the strategic  
16 area --

17 MR. BURKE: Objection to the  
18 form.

19 BY MR. GEBHARDT:

20 Q -- from the beginning of the  
21 company's inception through the bankruptcy filing?

22 A There was probably no specific  
23 date or point where things changed from -- say  
24 from one day all of a sudden changed to the next.

11

1 My duties evolved over a period of time and  
2 sometimes they would evolve and then depending on  
3 how things were working out, they would regress  
4 backwards before they would move forward. So I  
5 describe it generally as an evolving role.

6 Q How about the year 1999, was your  
7 role strategic then?

8 A I would say so.

9 Q Consistent with what you've  
10 described for the year 2000?

11 A Well, I think the only thing I  
12 described was you asked very specifically relative  
13 to bidding projects and so as it relates to that  
14 particular area, I'll say that was consistent back  
15 into 1999.

16 Q And I take it the same thing for  
17 employment?

18 A Yes.

19 MR. BURKE: Objection to the  
20 form. Do you understand the question?

21 A If what you mean is the way I  
22 describe my role relative to employment in 2000  
23 the same as in 1999, I would say generally close.  
24 BY MR. GEBHARDT:

12

1 Q What was your role beginning in  
2 1999 with finance and lending in connection with  
3 the company?

4 MR. BURKE: Finance and lending?

5 MR. GEBHARDT: Let me rephrase  
6 that.

7 BY MR. GEBHARDT:

8 Q What involvement did you have in  
9 the financing of the company's operations,  
10 starting in 1999?

11 A Well, is there some specific --  
12 do you want to give me something more specific  
13 that I can respond to?

14 Q Would you describe your role --

15 A Is there a particular note or  
16 agreement or something that you are trying to  
17 refer to because finance and lending --

18 Q Financing, I understand that,  
19 financing the company's day-to-day operations  
20 beginning in 1999, was your involvement on a  
21 strategic basis consistent with what you've  
22 described for the bidding process and the  
23 employment process?

24 MR. BURKE: Objection to the

13

1 form.

2

---

3 (Whereupon the court reporter read  
4 back the pertinent testimony.)

5

---

6 A There are two different functions  
7 of the company.

8 BY MR. GEBHARDT:

9 Q What was your function in  
10 financing the company's operations?

11 A I guess as far as -- I'm trying  
12 to think in 1999, financing of the company was  
13 generally to meet with the appropriate  
14 individuals. I met with the bank officers a  
15 couple of times, generally just discussing or  
16 marketing calls on their part, I think. In 1999,  
17 if there was a specific note that I sat down and  
18 discussed with the bank, if that's what you're  
19 referring to, then we can talk about that one, but  
20 I'm really lost as far as -- before you mentioned  
21 a specific -- if you give me something specific,  
22 I'd be more than happy to respond.

23 Q Can you tell me who Sheri  
24 Phillips is?

14

1 A Sheri was the chief financial  
2 officer.  
3 Q How long was she with CCI?  
4 A Five years, maybe six, maybe  
5 less.  
6 Q What were her duties as CFO?  
7 A She was a CFO, she was  
8 responsible for the day-to-day, I'll say,  
9 accounting functions of the company as well as  
10 some other ancillary duties that she was involved  
11 in, but primarily it was the accounting.  
12 Obviously anything that was finance related would  
13 fall under her direct responsibilities.  
14 Q Was she the person who dealt  
15 directly with the banks that CCI may have dealt  
16 with?  
17 A She had dealings with them, yes.  
18 Q How would the amount of her  
19 dealings compare with the amount of your dealings?  
20 MR. BURKE: Are we in '99 or  
21 another time period?  
22 MR. GEBHARDT: Over the period  
23 she was employed by CCI.  
24 A Well, I would have to say they

15

1 evolved because when she first joined the company  
2 she didn't join as the chief financial officer.  
3 So when she first joined, her role would have been  
4 one thing and then over time her role evolved to  
5 the point she became the chief financial officer.  
6 BY MR. GEBHARDT:  
7 Q When she became the chief  
8 financial officer, was she the person for CCI who  
9 dealt directly and primarily with the bank?  
10 A Yes. She dealt with the bank,  
11 yes.  
12 Q Primarily?  
13 A I'd say she had more frequent  
14 contact with them than I did. And so by that  
15 you're meaning primary, then I would say I guess  
16 the answer would be yes.  
17 Q And she had authority on behalf  
18 of CCI to execute loan documents for the company?  
19 A Yes, she did.  
20 Q When did she get that authority?  
21 A At some point in time after she  
22 became the chief financial officer.  
23 Q Can you give me an approximate  
24 year?

16

1 A If you gave me the date she  
2 became chief financial officer, I would be able to  
3 pinpoint it more on a time line from there.  
4 ---  
5 (Whereupon the document was  
6 marked for identification as Exhibit Number 1.)  
7 ---  
8 BY MR. GEBHARDT:  
9 Q I've handed you what has been  
10 marked as Deposition Number 1, which purports to  
11 be a letter from Sheri Phillips as chief financial  
12 officer to Craig Schwartz of Dauphin Deposit Bank  
13 dated July 6th, 1998.  
14 In the last sentence she states,  
15 quote, I am authorized to execute loan documents  
16 on behalf of the corporation, period, end quote.  
17 That was an accurate statement at the time Ms.  
18 Phillips wrote it?  
19 A Yes.  
20 Q And given that she was authorized  
21 to execute loan documents, was she also authorized  
22 to negotiate the loan documents?  
23 A Yes.  
24 Q When did Ms. Phillips' employment

17

1 with the company terminate?  
2 A It would have been sometime in  
3 2000.  
4 Q After the bankruptcy?  
5 A Yes.  
6 Q When is the last time you spoke  
7 with Sheri Phillips?  
8 A Well, let's see, I spoke to her  
9 yesterday, as a matter of fact.  
10 Q And what was the substance of the  
11 discussion with her?  
12 A I told her that she would  
13 probably be getting a subpoena from the bank to --  
14 that the bank wanted to take her deposition.  
15 Q What else did you talk about?  
16 A That was generally about it. I  
17 told her there was a lawsuit, that the bank was  
18 suing me and that the bank wanted to take her  
19 deposition.  
20 Q How long did the conversation  
21 last?  
22 A Ten, 15 minutes.  
23 Q Prior to that conversation, when  
24 was the last time you had spoken with her?



18

1 A I'd seen her at some functions,  
2 so if you're counting that, to say hello.

3 Q The direct call from her to you  
4 or you to her.

5 A Oh, a year.

6 Q Why did you take it upon yourself  
7 to place that call yesterday?

8 MR. BURKE: Let me confer with my  
9 client regarding the privilege issue.

10 MR. GEBHARDT: What privilege  
11 issue?

12 MR. BURKE: That's why I need to  
13 talk to him. In answering that question it may  
14 reveal attorney/client privilege.

15 ---

16 (Witness conferring with counsel.)

17 ---

18 MR. BURKE: I'm going to object  
19 and instruct the witness not to answer because  
20 answering that would reveal attorney/client  
21 communication.

22 ---

23 (Whereupon the court reporter  
24 read back the pertinent testimony.)

19

1 ---

2 MR. GEBHARDT: You're instructing  
3 him not to answer that?

4 MR. BURKE: Correct.

5 BY MR. GEBHARDT:

6 Q Would I be correct, Mr. Ortenzio,  
7 that you placed the call after a discussion with  
8 your counsel?

9 A Yes, that's correct.

10 Q And you would not have placed the  
11 call other than for that discussion with your  
12 counsel?

13 MR. BURKE: I'm going to object  
14 on the same grounds that answering that question  
15 would reveal attorney/client communication.

16 MR. GEBHARDT: It's not a  
17 question of revealing that a conversation took  
18 place. The privilege applies to the substance of  
19 the conversation and I think I'm entitled to the  
20 follow-up to establish the context and whether  
21 there is a basis for the assertion of  
22 attorney/client privilege by preliminary  
23 questioning.

24 MR. BURKE: You're absolutely

20

1 entitled to follow up but not to the extent that  
2 answering the question would reveal the substance  
3 of the communication between myself and Mr.  
4 Ortenzio.

5 MR. GEBHARDT: I didn't ask for  
6 that. I asked for something revealing a yes or no  
7 answer.

8 MR. BURKE: I understand, but  
9 it's not what you asked. It's whether the answer  
10 that the witness gives would reveal the substance  
11 of communication between himself and his attorney,  
12 and on that grounds I'm objecting and instructing  
13 the witness not to answer.

14 BY MR. GEBHARDT:

15 Q Did you discuss with Sheri  
16 Phillips things your attorney told you?

17 MR. BURKE: I'm going to object  
18 again, Counsel. I realize you're entitled to do  
19 some follow-up on this, but to the extent you've  
20 already asked the witness what he discussed with  
21 Ms. Phillips and now you're asking him if some of  
22 those things he discussed with Ms. Phillips were  
23 things that I may or may not have directed him to  
24 ask, and I believe that would reveal

21

1 attorney/client communication and I'm not going to  
2 permit the witness to answer the question.

3 MR. GEBHARDT: If he discussed  
4 matters with Sheri Phillips that were discussed  
5 first with you, then that's a disclosure to a  
6 third party that waives the privilege.

7 ---

8 (Whereupon the court reporter  
9 read back the pertinent testimony.)

10 ---

11 MR. GEBHARDT: That could be  
12 answered yes or no.

13 MR. BURKE: You already asked him  
14 what was discussed and if any of the items that  
15 were discussed were things that I had revealed, a  
16 separate discussion I had with Mr. Ortenzio, then  
17 it does reveal the attorney/client communication.  
18 You're permitted to ask this witness what  
19 communications he had with this third party. You  
20 can ask all of those questions about what the  
21 communication was, but you cannot tie it back to  
22 the communication he may have had, in fact did  
23 have with his attorney. So you're free to ask  
24 everything about the substance of the

22

1 Phillips/Ortenzio communication, but you're not  
2 allowed to ask further to the extent it would  
3 reveal a communication I had with my client.

4 MR. GEBHARDT: You've instructed  
5 him not to answer?

6 MR. BURKE: Correct.

7 BY MR. GEBHARDT:

8 Q Could you tell me who Shane  
9 Miller is, S-H-A-N-E?

10 A He was the chief financial  
11 officer of the company -- excuse me, chief  
12 operating officer.

13 Q How long was he with the company?

14 A Seven, maybe eight years.

15 Q What did his duties consist of?

16 A At what point in time?

17 Q Over the seven or eight years he  
18 worked for the company.

19 A They evolved from when he first  
20 joined the company until when he left the company.

21 Q So describe what they were when  
22 he first joined and tell me how they evolved.

23 A When he first joined, he joined  
24 as a project manager for mechanical work that we

23

1 were managing and when he left in 2000, he was the  
2 chief operating officer of the entire company.

3 Q And what did his duties consist  
4 of as the chief operating officer?

5 A He would have been responsible  
6 for day-to-day operational matters in the company.

7 Q He reported to you?

8 A Yes.

9 Q What role, if any, did he have in  
10 financing the company's activities?

11 A Probably whatever his  
12 communications, whatever his needs were relative  
13 to the company, communicating them to Sheri  
14 Phillips, myself. So as upper management,  
15 obviously his opinion was sought.

16 Q He would, if I'm permitted to  
17 paraphrase, describe to you what he viewed the  
18 bank's financing needs were and then you or Ms.  
19 Phillips would communicate or discuss those with  
20 the bank?

21 MR. BURKE: The bank's financing  
22 needs or the company's needs?

23 MR. GEBHARDT: Company's  
24 financing needs.

24

1 A As the chief operating officer he  
2 participated in many discussions that were  
3 relevant to what the financial needs of the  
4 company were.

5 BY MR. GEBHARDT:

6 Q Did he ever have any dealings  
7 directly with the bank?

8 A Yeah.

9 Q And what would those dealings  
10 have consisted of?

11 A I think he participated in  
12 meetings, any meetings that would have been with  
13 the bank in conjunction with Sheri Phillips and in  
14 conjunction with myself and Sheri Phillips if the  
15 three of us were meeting with the bank.

16 Q To your knowledge, did he ever  
17 execute any loan documents?

18 A No, I don't believe so.

19 Q Did he have authority to execute  
20 loan documents?

21 A Yes, he would have, in certain  
22 aspects. Back to the question, he did have  
23 authority to execute loan documents and on  
24 occasion he did.

25

1 Q When did Mr. Miller leave the  
2 company's employ?

3 A 2000.

4 Q After the bankruptcy?

5 A Yes.

6 Q When is the last time you spoke  
7 with Mr. Miller?

8 A Can I talk to you for a second?

9 MR. GEBHARDT: When there's a  
10 question pending, you may be entitled to discuss  
11 privileged issues but not to discuss the witness's  
12 response to the question that's on the floor.

13 MR. BURKE: Do you have a  
14 question on a privilege issue?

15 A Yes.

16 MR. BURKE: The witness just  
17 turned to me to confer because he had a question  
18 about attorney/client and I'll ask the court  
19 reporter to read the question back.

20 ---

21 (Whereupon the court reporter  
22 read back the pertinent testimony.)

23 ---

24 MR. BURKE: You can answer that.

- 26

1 A I spoke with him last month.  
 2 BY MR. GEBHARDT:  
 3 Q Did you place the call?  
 4 A Yes.  
 5 Q Where did you place the call to?  
 6 A I placed the call to a phone  
 7 number I had gotten for him.  
 8 Q What location?  
 9 A He's in California.  
 10 Q What part of California?  
 11 A I believe the southern part.  
 12 Q Is there a city that you are  
 13 aware of?  
 14 A No.  
 15 Q Where did you get his phone  
 16 number?  
 17 A I got it from a consultant that  
 18 the company had used toward the end of 2000, had a  
 19 number for him, and he gave it to me.  
 20 Q Can you identify the consultant?  
 21 A Yes. His name is Mr. Versaw.  
 22 Q Spell that.  
 23 A V-E-R-S-A-W.  
 24 Q What was he consulting -- was he

1 bank.

2 Q Did you tell him what the  
 3 substance of the lawsuit was?

4 A Told him that the bank was suing  
 5 me.

6 Q And did you tell him the reason  
 7 the bank was suing you?

8 A I told him it had to do with the  
 9 notes that the company had, but we didn't go into  
 10 much detail.

11 Q And how long did you talk with  
 12 him?

13 A I think the total of the  
 14 conversation was probably 20 minutes to a half an  
 15 hour.

16 Q Had you spoken with him at all  
 17 prior to that conversation and subsequent to his  
 18 leaving the employ of the company?

19 A No.

20 Q How long had CCI been dealing  
 21 with Dauphin Deposit and then AllFirst Bank?

22 A I think the first banking  
 23 relationship would have been initiated probably in  
 24 the early '90s.

27

1 consulting with CCI?  
 2 A Yes.  
 3 Q About what?  
 4 A Construction matters.  
 5 Q I understand that. Was there a  
 6 particular project?  
 7 A Yes, Scott Air Force Base  
 8 project.  
 9 MR. BURKE: Was Versaw consulting  
 10 with CCI?  
 11 MR. GEBHARDT: Yes.  
 12 BY MR. GEBHARDT:  
 13 Q That was in connection with  
 14 putting together a claim on behalf of CCI for  
 15 presentation for work done on the Scott Air Force  
 16 base matter?  
 17 A Back at that time, yes.  
 18 Q Did you call Mr. Miller as a  
 19 result of conversations with your counsel?  
 20 A Yes.  
 21 Q And what did you discuss with Mr.  
 22 Miller when you called him?  
 23 A Told him that there was a lawsuit  
 24 and that he may be getting a subpoena from the

29

1 ---

2 (Whereupon the document was  
 3 marked for identification as Deposition Exhibit  
 4 No. 2.)

5 ---

6 BY MR. GEBHARDT:

7 Q I've handed you a letter dated  
 8 December 7, 1992 from Wendy Scheib, S-C-H-E-I-B,  
 9 to the State of Connecticut, Department of  
 10 Consumer Protection. In that letter Ms. Scheib  
 11 says, quote, CCI Construction Company, Inc. has  
 12 been a customer of Dauphin Deposit Bank and Trust  
 13 Company for the past two years, period, end quote.

14 Does that refresh your  
 15 recollection as to when CCI may have started  
 16 dealing with Dauphin Deposit?

17 A Well, yes, it makes it earlier  
 18 than maybe what was I stating as the early '90s.  
 19 So that would put it back to December 7th, 1990.

20 Q Would I be correct that when CCI  
 21 began doing business with Dauphin Deposit, it was  
 22 in connection with a line of credit for the  
 23 company?

24 A It's possible. I don't recall

30

1 exactly when our first relationship was.  
 2 **Q** When you started dealing with --  
 3 by you, I mean CCI Construction -- when CCI  
 4 Construction started dealing with Dauphin Deposit,  
 5 did it obtain a line of credit?  
 6 **A** That was our first relationship?  
 7 **Q** When CCI began dealing with  
 8 Dauphin Deposit did it ultimately obtain a line of  
 9 credit?  
 10 **A** Probably.  
 11 **Q** Once it obtained that first line  
 12 of credit, it maintained that line of credit with  
 13 Dauphin Deposit right up through the date of the  
 14 default declaration by AllFirst?  
 15 **A** Yes.  
 16 **Q** Would I be correct that that line  
 17 of credit increased over the years?  
 18 **A** I believe it did, yes.  
 19 **Q** The final amount of authorized  
 20 credit was the \$4 million that was in effect at  
 21 the time AllFirst declared the default in 2000?  
 22 **A** Yes.  
 23 **Q** And at all times the line of  
 24 credit was unsecured?

32

1 **A** Well, this is a draft and it's  
 2 not executed.  
 3 BY MR. GEBHARDT:  
 4 **Q** So you don't know?  
 5 **A** It may have and may not be.  
 6 MR. GEBHARDT: And let's mark  
 7 this as Exhibit 4.  
 8 ---  
 9 (Whereupon the document was  
 10 marked for identification as Deposition Exhibit  
 11 No. 4.)  
 12 ---  
 13 BY MR. GEBHARDT:  
 14 **Q** I've handed you what has been  
 15 marked as Deposition Exhibit 4 which purports to  
 16 be a letter dated October 14, 1993 from Andrew  
 17 Hetrick, H-E-T-R-I C-K, Dauphin Deposit to CCI  
 18 Construction. Do you recognize your signature on  
 19 the last page?  
 20 **A** Yes, I do.  
 21 **Q** And would I be correct as of  
 22 October 14, 1993 CCI had a \$1 million line of  
 23 credit with Dauphin Deposit?  
 24 **A** Yes.

31

1 **A** No, I don't believe that to be  
 2 the case. I believe the in original relationship  
 3 the line was secured.  
 4 MR. GEBHARDT: Mark that as the  
 5 next exhibit.  
 6 ---  
 7 (Whereupon the document was  
 8 marked for identification as Deposition Exhibit  
 9 No. 3.)  
 10 ---  
 11 BY MR. GEBHARDT:  
 12 **Q** I've handed you what has been  
 13 marked as Deposition Exhibit 3 which purports to  
 14 be a commitment letter from Wendy Scheib, Dauphin  
 15 Deposit to Dave Barber, treasurer of CCI  
 16 Construction. Would I be correct when you've had  
 17 occasion to review this, that in June of 1992 CCI  
 18 had a \$600,000 line of credit with Dauphin?  
 19 MR. BURKE: Take your time  
 20 reading the document.  
 21 ---  
 22 (Whereupon the court reporter  
 23 read back the pertinent testimony.)  
 24 ---

33

1 **Q** Would I be correct that there was  
 2 no collateral posted as security for the revolving  
 3 line of credit?  
 4 MR. BURKE: Are you asking if  
 5 this is what the document says or what his  
 6 recollection is?  
 7 MR. GEBHARDT: Well, both.  
 8 BY MR. GEBHARDT:  
 9 **Q** We have a commitment letter. Do  
 10 you see anywhere in the commitment letter that any  
 11 collateral would be posted?  
 12 MR. BURKE: I'll object to the  
 13 form because obviously the document will speak for  
 14 itself, but the witness can answer. Do you have  
 15 the actual loan document for this, counsel?  
 16 MR. GEBHARDT: I have a question  
 17 pending.  
 18 **A** There does not appear to be any  
 19 collateral.  
 20 BY MR. GEBHARDT:  
 21 **Q** Having reviewed this commitment  
 22 letter, would it be consistent with your  
 23 recollection to state that at least as of 1993 CCI  
 24 Construction had not granted a security interest



34

1 in its assets to secure a line of credit with  
2 Dauphin Deposit?

3 MR. BURKE: Objection to form.

4 You can answer.

5 A Well, I can state as it relates  
6 to this commitment letter, October 14, 1993,  
7 there's no collateral.

8 BY MR. GEBHARDT:

9 Q And would I be correct that you  
10 personally, John Ortenzio, did not guarantee  
11 repayment of the line of credit?

12 A This one here?

13 Q Yes.

14 A That appears to be based on the  
15 commitment letter.

16 Q Would I be correct that as of  
17 1993, with the line of credit that was extended  
18 that year, CCI was required to be fully paid out  
19 of the line of credit for at least 30 consecutive  
20 days during the year?

21 MR. BURKE: Same objection to  
22 form in that the document will speak for itself.  
23 You can answer.

24 A It does state that.

34

1 agings to the bank during the term of the line of  
2 credit. Isn't that true?

3 A To the extent that the line was  
4 drawn on.

5 Q Would you tell me what CCI  
6 Associates was?

7 A I don't recall. I think that we  
8 were changing our name at that time and I think  
9 this came at that juncture, so they wanted both  
10 entities on the loan document.

11 ---

12 (Whereupon the document was marked  
13 for identification as Deposition Exhibit No. 5.)

14 ---

15 BY MR. GEBHARDT:

16 Q Would you take a look, please, at  
17 Exhibit 5 which is a letter dated July 21, 1994  
18 from Andrew Hetrick to Dave Barber of CCI  
19 Construction purporting to be a commitment letter.  
20 Do you recognize your signature on the last page?

21 A Yes, I recognize it.

22 Q And would I be correct that  
23 Deposition Exhibit 5 is a renewal of the \$1  
24 million line of credit that's referenced as

35

1 BY MR. GEBHARDT:

2 Q And did you understand as of 1993  
3 when you signed this commitment letter that the  
4 proceeds of the line of credit were to be used to  
5 finance accounts receivable?

6 A That's what it says.

7 Q You had that understanding as the  
8 president of the company?

9 A Well, I'm thinking back to 1993,  
10 the use of the line back at that time was  
11 probably -- going back that far I can't tell you  
12 exactly how the funds were used.

13 Q You understand the bank intended  
14 to loan you money?

15 MR. BURKE: Are you asking his  
16 recollection?

17 A I signed the document, use of  
18 proceeds, finance accounts receivable.

19 BY MR. GEBHARDT:

20 Q That was your understanding when  
21 you signed it?

22 A I assume it was.

23 Q As a matter of fact, CCI was  
24 required to submit monthly accounts receivable

35

1 Deposition Exhibit 4?

2 A I don't know if it's a renewal.  
3 It looks as though they've crossed out all the  
4 dates from the previous one. It's a \$1 million  
5 line of credit, the letter is dated July. So  
6 it's -- it's a little early for a renewal. So  
7 it's either a new one or an early renewal.

8 Q If you look at Deposition Exhibit  
9 4, you will see that in the first page there's an  
10 expired date of the line of credit of June 30,  
11 1994, and this letter was issued in July.

12 A This came in July, so this would  
13 have replaced that. Based on the document it  
14 appears that replaced the other.

15 Q It continues as a \$1 million  
16 unsecured line of credit that had not been  
17 guaranteed by you?

18 MR. BURKE: Are you asking what  
19 the document says or what his independent  
20 recollection is?

21 MR. GEBHARDT: What his  
22 understanding is having had the benefit of  
23 reviewing the document.

24 A That's what it appears.

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1 BY MR. GEBHARDT:

2 Q Would I be correct this renewal  
3 was for the purpose of financing the company's  
4 accounts receivable?

5 A That's what it says.

6 Q And once again, the company was  
7 required to submit monthly accounts receivable  
8 agings to Dauphin Deposit as a condition of the  
9 line of credit being available?

10 A Yes, that's what it says.

11 ---

12 (Whereupon the document was  
13 marked for identification as Deposition Exhibit  
14 No. 6.)

15 ---

16 BY MR. GEBHARDT:

17 Q I've handed you Deposition  
18 Exhibit 6, which is a letter dated June 14, 1995  
19 from Andrew Hetrick to Sheri Phillips, Controller,  
20 CCI Construction, which appears to be a renewal of  
21 the line of credit. Do you recognize Sheri  
22 Phillips' signature on the last page?

23 A Yes.

24 Q Do you recognize Shane Miller's

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1 signature as senior vice president?

2 A Yes.

3 Q And would I be correct that this  
4 is another renewal of the \$1 million unsecured  
5 revolving line of credit from Dauphin Deposit?

6 A It appears to be.

7 Q And again this was unguaranteed  
8 by you personally?

9 A Yes, it appears to be the case.

10 Q Once again, the purpose for the  
11 use of the loan proceeds was to finance accounts  
12 receivable?

13 A That is what it says.

14 Q There is to be a monthly  
15 borrowing base certificate reflecting the  
16 company's accounts receivable submitted?

17 A No. It's marked as quarterly --  
18 excuse me for a minute.

19 ---

20 (Whereupon the documents were  
21 marked for identification as Deposition Exhibit  
22 Nos. 7, 8 and 9.)

23 ---

24 BY MR. GEBHARDT:

40

1 Q Take a look at Deposition Exhibit  
2 7 that's in front of you. Do you recognize that  
3 as a letter dated May 1, 1996 from Craig Schwartz  
4 to Sheri Phillips, again renewing the \$1 million  
5 line of credit?

6 A The question is?

7 Q Do you remember this letter,  
8 which is Deposition Exhibit 7, as a renewal of the  
9 \$1 million unsecured revolving line of credit from  
10 Dauphin Deposit to CCI Construction?

11 A I don't -- looking at the  
12 document, I'm not going to be able to say this was  
13 a renewal or a new one. So, I mean, it is clearly  
14 what it says, it is a \$1 million line of credit,  
15 and used the term renewal, for all I know since  
16 they were negotiating it or obviously this was  
17 done yearly, renew or replacement, but I don't  
18 want to get caught up in the semantics, but it is  
19 what it says on the face. There's nothing on  
20 there that says renewal.

21 Q Let's not call it a renewal then.  
22 Do you recognize this was a \$1 million line of  
23 credit from Dauphin Deposit to CCI?

24 A That's the -- yes, that's what it

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1 appears to be.

2 Q And it was unsecured. Correct?

3 A That's what it appears to be,  
4 yes.

5 Q And you did not guarantee it?

6 A It would not appear as though I  
7 did.

8 Q As with the predecessor  
9 commitment letters that you reviewed, the use of  
10 the line proceeds is for financing accounts  
11 receivable?

12 A That's what the commitment letter  
13 says, unless it is for some reason changed by the  
14 loan documents themselves.

15 Q Consistent with what's going on  
16 before, the company is required to submit this  
17 time on a monthly basis an accounts receivable  
18 aging?

19 A That's what the commitment letter  
20 says. The commitment letter says use of proceeds  
21 to finance the accounts receivable. Whether or  
22 not during that year that was the reality of the  
23 practice or not, I cannot say, but that is what it  
24 says.

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1 Q You recognize Sheri Phillips'  
2 signature on the bottom line on behalf of CCI  
3 Construction?

4 A Yes. I can testify to what the  
5 document says. Whether or not the practice of the  
6 relationship, all the conditions here were adhered  
7 to, I couldn't say.

8 Q CCI intended to live up to its  
9 agreements with the bank, didn't it?

10 A I think we always lived up to our  
11 agreements with the bank, to the best of my  
12 knowledge. Whether or not in the length of  
13 relationship that we had, whether every covenant  
14 was strictly adhered to or not, I can't sit here  
15 and tell you for sure. Obviously I see what it  
16 says in the commitment letter. Whether or not  
17 each and every one of the conditions stated in  
18 here survived the loan document or in practice  
19 were adhered to, I couldn't say.

20 Q If you look at Page 2, the last  
21 paragraph, the last sentence, there's the  
22 statement, quote, all terms and conditions  
23 contained herein shall survive the execution of  
24 such loan documentation, period, end quote.

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1 So you would agree that these  
2 conditions continued after any loan documents were  
3 signed?

4 MR. BURKE: I'm going to object  
5 to the form of the question. If you're asking  
6 what the document says, that's one thing. If  
7 you're asking a legal conclusion, I believe that's  
8 something else. Are you asking what the document  
9 says?

10 MR. GEBHARDT: I stated the  
11 question. You may answer. You stated your  
12 objection.

13 MR. BURKE: Would you read the  
14 question back, please?

15 MR. GEBHARDT: Let me rephrase  
16 the question.

17 BY MR. GEBHARDT:

18 Q Would you agree that the  
19 commitment letter says that its terms and  
20 conditions survived the execution of any follow-up  
21 loan documents?

22 A Which page are you on?

23 Q Second page, last paragraph, last  
24 sentence.

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1 A That appears to be as what it  
2 says. That is typical or I'll say standard  
3 language. All I'm saying is whether or not in  
4 practice all the terms and conditions were adhered  
5 to, specifically, I can't say.

6 Q Would I be correct that at least  
7 as of this letter, which is May 1, 1996, CCI  
8 Construction's borrowings were limited to 80  
9 percent of the accounts receivable that were less  
10 than 90 days old shown on accounts receivable  
11 aging, and that's on Page 2?

12 A That's what it says. And again,  
13 whether or not in practice that that was adhered  
14 to or not, I can't say.

15 Q Let's take a look at Exhibit 8.

16 Would you agree that Deposition Exhibit 8 is a  
17 commitment letter dated April 15, 1997 from  
18 Dauphin Deposit to CCI Construction extending a \$1  
19 million line of credit?

20 A The document is a commitment  
21 letter, principal amount of \$1 million to finance  
22 work in process and accounts receivable.

23 Q So now in addition to accounts  
24 receivable, the commitment letter is committing

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1 the financing work in progress. Is that correct?

2 A Process. That's what it says.

3 Q And it's unsecured?

4 A The commitment letter appears to  
5 be.

6 Q And you did not guarantee it?

7 A I don't see anywhere on here  
8 where I did.

9 Q And CCI was also required to  
10 commit monthly accounts receivable agings?

11 A I believe it says quarterly --  
12 no, monthly on the accounts receivable aging.

13 Q CCI's borrowing were limited to  
14 80 percent of accounts receivable under 90 days.  
15 Right?

16 MR. BURKE: Just so the record is  
17 clear, you're again asking him what it says on  
18 this document?

19 MR. GEBHARDT: Yes.

20 A That's what it says. However, it  
21 is somewhat inconsistent with use of proceeds  
22 because it says finance work in process. Well,  
23 work in process doesn't really apply to 80 percent  
24 of accounts receivable and 90 days from the

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1 invoice date. So there's a little bit of an  
 2 inconsistency there in terms of use of proceeds.  
 3 BY MR. GEBHARDT:  
 4 Q Would you take a look at Exhibit  
 5 9?  
 6 A Okay.  
 7 Q And would you agree that Exhibit  
 8 9 is a commitment letter from Dauphin Deposit  
 9 dated April 20, 1998 from Craig Schwartz to Sheri  
 10 Phillips at CCI providing a \$2 million revolving  
 11 line of credit?  
 12 A \$2 million line of credit, yes.  
 13 Q And again, it's still unsecured  
 14 and does not carry your personal guarantee?  
 15 A Appears to be.  
 16 Q And again, as with the 1997  
 17 commitment letter, the purpose for the use of the  
 18 loan proceeds was to finance work in process and  
 19 accounts receivable?  
 20 A Yes, that's what it says.  
 21 Q And consistent with the earlier  
 22 commitment letters, CCI was required to submit an  
 23 accounts receivable aging, at this time as with  
 24 1997 on a monthly basis?

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1 MR. BURKE: Again, you're asking  
 2 what the document says?  
 3 MR. GEBHARDT: Yes.  
 4 A The document says monthly basis,  
 5 accounts receivable aging.  
 6 BY MR. GEBHARDT:  
 7 Q And borrowings are limited to 80  
 8 percent of accounts receivable under 90 days per  
 9 the commitment letter. Right?  
 10 A That's what it says. Again,  
 11 there might be some inconsistency there with the  
 12 front page use of proceeds.  
 13 Q Now, feel free to look back at  
 14 them. It appears that each of these commitment  
 15 letters requires CCI to be completely paid out of  
 16 the revolving line of credit for 30 consecutive  
 17 days in any one-year period. Would you agree with  
 18 that?  
 19 MR. BURKE: I'll object to the  
 20 form of the question to the extent the documents  
 21 speak for themselves. If you want the witness to  
 22 go back and look at every document and confirm  
 23 what it says.  
 24 BY MR. GEBHARDT:

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1 Q If you choose to. I'm asking a  
 2 question, upon the inception of the line of credit  
 3 as reflected in the commitment letter, there was a  
 4 requirement that CCI be paid out of the line of  
 5 credit for 30 consecutive days. Isn't that a  
 6 fact?  
 7 MR. BURKE: I also object to form  
 8 to the extent that it calls for a legal  
 9 conclusion.  
 10 A It says that in the commitment  
 11 letters. Whether or not that in practice that was  
 12 adhered to, I couldn't tell you.  
 13 BY MR. GEBHARDT:  
 14 Q As the president, sole  
 15 shareholder and sole director of CCI, did you  
 16 familiarize yourself with the terms of the  
 17 borrowing arrangements between CCI and Dauphin  
 18 Deposit?  
 19 A Sometimes if there was a specific  
 20 need, but over the time of the relationship it  
 21 seemed to flow pretty good and there wasn't much  
 22 of a need to interpose myself directly, as you can  
 23 tell from the signing of the documents there other  
 24 than being aware of them, as far as any

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1 discussions with the bank, if that's what you're  
 2 alluding to.  
 3 Q No. I'm just saying did you  
 4 generally understand the terms and conditions of  
 5 the revolving line of credit CCI had with Dauphin?  
 6 A I understood we had a million  
 7 dollars and it increased over the years as our  
 8 work volume grew, so I understood that. It was  
 9 used to finance our work in process and accounts  
 10 receivable. Whether or not all of the terms and  
 11 conditions that were stated in the commitment  
 12 letter as well as maybe even the loan documents  
 13 were adhered to, I couldn't say specifically.  
 14 ---  
 15 (Whereupon the document was  
 16 marked for identification as Deposition Exhibit  
 17 No. 10.) ---  
 18 BY MR. GEBHARDT:  
 19 Q I've handed you what has been  
 20 marked as Deposition Exhibit 10 which purports to  
 21 be financial statements of CCI Construction  
 22 Company, Inc. as of December 31, 1998 and 1997  
 23 with the independent auditor's report of Brown,  
 24 Schultz, Sheridan & Fritz. Do you recognize this



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1 document as being CCI's financial statements for  
2 those two years?

3 A This is what it appears to be.

4 Q And Exhibit 10 accurately  
5 reflects the financial performance of CCI in 1997  
6 and 1998?

7 MR. BURKE: Objection to the  
8 form. I believe the document speaks for itself.  
9 The witness can answer.

10 A Yes. These were audit statements  
11 so I have no reason to doubt that they don't  
12 purport to be the accurate assessment of the  
13 company.

14 BY MR. GEBHARDT:

15 Q As of December 31, 1999, would I  
16 be correct in saying that CCI had three credit  
17 facilities with -- I guess what was then AllFirst  
18 Bank or whatever the name, I'll refer to it as  
19 AllFirst Bank for reference, although the names  
20 may have varied depending on the specific time.  
21 There were three facilities, to your knowledge?

22 A Yes.

23 Q There's a revolving line of  
24 credit, a \$1.2 million loan and a \$2 million

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1 commitment letter for a \$4 million line of credit  
2 from First National Bank of Maryland as successor  
3 to Dauphin?

4 A It is what it is.

5 MR. BURKE: Take your time and  
6 read the document.

7 A \$4 million unsecured line of  
8 credit.

9 BY MR. GEBHARDT:

10 Q This was the last commitment  
11 letter issued by First National prior to the  
12 declaration of default that occurred in February  
13 of 2000 for a line of credit?

14 A Probably, yes.

15 Q As you've indicated, the amount  
16 is now \$4 million as opposed to \$2 million that  
17 was available in 1998?

18 A Yes.

19 Q Would I be correct that CCI  
20 provided First National with the financial  
21 statements that are reflected in Exhibit 10 in  
22 connection with obtaining that line of credit and  
23 its increased amount?

24 A They would most likely have

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1 equipment line of credit, right, as of 12/31/99?

2 A I believe the \$2 million  
3 equipment was a loan that was being amortized. I  
4 don't believe it was a line of credit. I think  
5 that one was a loan that was being amortized.

6 Q There was an equipment purchase  
7 facility. Right?

8 A But it was treated more as, I  
9 believe, a loan because it was being amortized  
10 over a specific term. So I think that was  
11 characterized as a loan rather than a line of  
12 credit.

13 ---

14 (Whereupon the document was  
15 marked for identification as Deposition Exhibit  
16 No. 11.)

17 ---

18 BY MR. GEBHARDT:

19 Q I've handed you Deposition  
20 Exhibit 11, which purports to be a letter dated  
21 March 23, 1999 from Craig Schwartz, Vice  
22 President, First National Bank of Maryland to  
23 Sheri Phillips, Chief Financial Officer of CCI  
24 Construction. Do you recognize this as a

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1 received financial statements.

2 Q And as with the earlier  
3 commitment letters for '98 and '97, the use of the  
4 proceeds was for the purpose of financing work in  
5 process and accounts receivable. Is that what it  
6 says?

7 A Yes.

8 Q And the commitment letter  
9 provides, does it not, that unless an earlier  
10 demand is made, all borrowings and the entire loan  
11 is due on April 30, 2000?

12 MR. BURKE: Objection to form.

13 A Yes, that's what this says.

14 However, I believe the loan document is different.

15 BY MR. GEBHARDT:

16 Q As with the earlier commitment  
17 letters, there's a requirement that CCI submit a  
18 monthly accounts receivable aging?

19 MR. BURKE: Objection to form.

20 You can answer.

21 A Yes, it does state that.

22 BY MR. GEBHARDT:

23 Q And that the borrowings are  
24 limited to 80 percent of qualified accounts

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1 receivable less than 90 days past due excluding  
2 retainages. Right?

3 A That's what it says.

4 Q And this commitment letter, as  
5 with the previous ones, provides that all the  
6 terms and conditions survive execution of the loan  
7 documents. Do you see that?

8 A That is where the -- that's what  
9 it says, though I can -- at least on one  
10 particular item I do believe the language  
11 superseded what was in the commitment letter.

12 Q As with the previous lines of  
13 credit, this one was unsecured by the assets of  
14 CCI and did not carry your personal guarantee?

15 A I believe that is correct.

16 ---

17 (Whereupon the document was  
18 marked for identification as Deposition Exhibit  
19 No. 12.)

20 ---

21 BY MR. GEBHARDT:

22 Q I've handed you what has been  
23 marked as Deposition Exhibit 12 which purports to  
24 be a film/cash solutions promissory note relating

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1 A There was the note itself.

2 Q This is the note itself, isn't  
3 it? That's my question.

4 A But there were some other  
5 documents associated with this. This is one of  
6 the documents.

7 Q Can you identify any other  
8 documents?

9 A Well, I guess there was a  
10 separate confession of judgment as you mentioned,  
11 and I believe there was one other.

12 Q A business purpose disclosure  
13 form or something of that nature?

14 A Last time I reviewed it there  
15 were other components to it, but this is the  
16 promissory note itself.

17 Q Do you see anything in that  
18 promissory note that overrides or contradicts the  
19 due date of borrowings under the line of credit  
20 from what the commitment says, namely that they're  
21 all due and payable on April 30, 2000?

22 MR. BURKE: Again, objection to  
23 the form of the question to the extent that it  
24 asks the witness to interpret a document that is

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1 to the \$4 million revolving line of credit. Do  
2 you recognize it as such?

3 A Yes.

4 MR. BURKE: One minute, Counsel.  
5 Give me an opportunity to look at the document.  
6 BY MR. GEBHARDT:

7 Q Does Exhibit 12 appear to be to  
8 your understanding and knowledge the promissory  
9 note that was executed in connection with the  
10 commitment letter that's Exhibit 11?

11 MR. BURKE: Object to the form.

12 The document will speak for itself. You may  
13 answer.

14 A I believe this is one of the  
15 documents that accompanied the \$4 million line of  
16 credit.

17 BY MR. GEBHARDT:

18 Q It's the promissory note, though,  
19 isn't it?

20 A This one is the promissory note,  
21 but there were also other documents associated  
22 with the \$4 million.

23 Q There were some disclosure forms  
24 about confessions of judgment and so on?

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1 right in front of us.

2 Are you asking him what it says  
3 or are you asking him what his recollection is?

4 MR. GEBHARDT: He said April 30,  
5 2000 was not necessarily when it was due. I'm  
6 asking him if there was anything in the promissory  
7 note he can point to that contradicts the  
8 commitment letter's requirement that the line of  
9 credit be repaid no later than April 30, 2000.

10 A Other than there is a 30-day  
11 notice required.

12 BY MR. GEBHARDT:

13 Q For defaults?

14 A I guess this is under the  
15 repayment section, Section 6.

16 Q You would admit you had notice of  
17 the commitment letter in excess of 30 days before  
18 April 30, 2000?

19 A Excuse me?

20 Q Commitment letter, being  
21 Deposition Exhibit 11, was in your possession  
22 longer than 30 days prior to April 30, 2000?

23 A I'm not sure I understand the  
24 question. Maybe you want to go back to your first

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1 question.

2 **Q You knew the revolving line of**  
3 **credit was required to be repaid or renewed or**  
4 **some other manner dealt with by April 30, 2000,**  
5 **didn't you?**

6 **A My recollection was that there**  
7 **was a due date when the note would be renewed, but**  
8 **there was a 30-day notice.**

9 **Q For demand of payment. Right?**

10 **A That's what it says.**

11 **Q There's some markings that appear**  
12 **to be Sheri Phillips' initials on page 3 of the**  
13 **note and then page 2 of the note. Do you see**  
14 **those?**

15 **A Yes, I see them.**

16 **Q Were those put on there by her at**  
17 **your direction?**

18 **A I'm not exactly sure how they**  
19 **came about, whether or not in her negotiation for**  
20 **the note she negotiated certain points of the**  
21 **note. She would have advised me of them prior to**  
22 **executing them, so I was aware prior to her**  
23 **executing the note. I don't know -- I did not**  
24 **participate in the negotiations of the note. I**

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1 don't believe they were specifically done at my  
2 direction. I think she negotiated the note,  
3 reviewed the points with me for my approval, which  
4 I granted, and negotiations were completed.

5 **Q Did she discuss with you the**  
6 **terms and conditions upon which the \$4 million**  
7 **revolving line of credit was being extended to**  
8 **CCI?**

9 **A We discussed the fact that we had**  
10 **at that time submitted for an increase to our line**  
11 **of credit and she was going to begin negotiations**  
12 **for it. So I was aware of that, yes.**

13 **Q You were aware there was a cash**  
14 **management feature accompanying this revolving**  
15 **line of credit?**

16 **A At the time that this was**  
17 **negotiated, no. I think the cash management was**  
18 **something that came afterwards, I believe.**

19 **Q After the execution of the**  
20 **documents?**

21 **A I think. I'm not sure, to tell**  
22 **you the truth. It may have even been before. I**  
23 **don't believe they were simultaneous. I think we**  
24 **were under a cash management program with them**

1 beforehand or it came afterwards, but I don't  
2 recall that they were negotiated at the same time.

3 **Q In connection with the \$4 million**  
4 **line of credit, was it CCI's practice to ask its**  
5 **customers to forward payments of CCI's billings**  
6 **directly to AllFirst?**

7 **A That was something that I**  
8 **think -- at what point in time are you referring**  
9 **to?**

10 **Q After the \$4 million line of**  
11 **credit was put into effect, which appears to be**  
12 **when the commitment letter was issued on March 23**  
13 **and when the promissory note was signed, I guess,**  
14 **which was sometime shortly thereafter, did you**  
15 **understand the cash management facility to be in**  
16 **place once the commitment letter was issued and**  
17 **the promissory note signed?**

18 **A I don't recall if the cash**  
19 **management system was in place after that or not.**  
20 **The exact date of the cash management system was**  
21 **put into effect with the company. I don't have an**  
22 **exact date as to when that was.**

23 **Q In 1999, was it the practice of**  
24 **CCI to request its customers to mail payments**

1 **directly to AllFirst?**

2 **A No. I think that the majority of**  
3 **them mailed them to us and we deposited them.**

4 **Q There were customers that paid**  
5 **CCI's billings directly to AllFirst, isn't that**  
6 **right?**

7 **A There were some projects where**  
8 **the project owner requested wiring instructions**  
9 **and they would wire funds.**

10 **Q What was your understanding of**  
11 **how the line of credit and the cash management**  
12 **feature worked on the \$4 million facility?**

13 **MR. BURKE: Meaning the witness**  
14 **or CCI's?**

15 **MR. GEBHARDT: His personal.**

16 **A Well, let's see, line of credits**  
17 **would fluctuate up and down and the cash**  
18 **management system would sweep our account at a**  
19 **certain point in time every night, empty our**  
20 **account, pull the funds back in. We would get a**  
21 **higher rate of interest on it, no rate deposit,**  
22 **and put the funds in honor of the checks to be**  
23 **presented the following day.**

24 **BY MR. GEBHARDT:**

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1 Q Would I be correct in saying that  
2 payments received by CCI either directly or that  
3 were sent by customers to AllFirst would be  
4 deposited?

5 A Right.

6 Q CCI only had one bank account  
7 into which its receivables were deposited. Right?

8 A Yes.

9 Q Those receivables were either  
10 deposited by CCI or by the customers directly?

11 A Yes.

12 Q And to the extent CCI had  
13 outstanding borrowings under the line of credit,  
14 the deposits would be used to pay down those  
15 borrowings?

16 A I guess, depending on -- I'm sure  
17 the procedure of the bank, if we would deposit the  
18 funds into -- funds would come in, be deposited  
19 into our account and the bank would sweep those  
20 funds, and then any checks that would be presented  
21 would then be honored by the bank.

22 Q If there were not enough funds on  
23 deposit to pay the checks that were presented,  
24 there would then be an advance on the line of

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1 would draw interest on behalf of CCI?

2 A I guess that's probably what  
3 would happen or used to offset interest charges  
4 that would be billed against us on a line of  
5 credit.

6 Q There would be no further  
7 advances on the loan, the revolving line of  
8 credit, until that excess deposit and this  
9 hypothetical \$700,000 had been drawn down?

10 A That I couldn't say. I wouldn't  
11 know -- I know sometimes there were some funds put  
12 into some -- possibly put into fixed short-term  
13 securities, 30, 60, 90-day paper, in which case  
14 something would be sitting there. So you have  
15 money and maybe the line was drawn down. I  
16 believe we did some of that at some point in time  
17 because it was advantageous.

18 Q You wouldn't do borrowings under  
19 the line of credit if there was a positive balance  
20 in the account, you meaning CCI?

21 A Depends on what the company was  
22 doing with short-term funds. If, hypothetically,  
23 if we had bought some short-term commercial paper  
24 because the interest rate was attractive, then we

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1 credit to cover those checks?

2 A The line of credit would be drawn  
3 down and so it would fluctuate up and down, and  
4 that's my understanding that's how it worked.

5 Q You didn't deal directly with  
6 this yourself?

7 A No.

8 Q Sheri Phillips did?

9 A Yes, she was the CFO. She would  
10 handle any day-to-day functions of the bank or as  
11 far as our deposits and disbursements.

12 Q Was it your understanding that if  
13 the deposits exceeded any existing borrowings  
14 under the line of credit that were still  
15 outstanding plus any checks that were presented,  
16 the excess would be placed in an interest-bearing  
17 account on behalf of CCI?

18 A Any excess funds?

19 Q If there was \$100,000 drawn  
20 hypothetically on the CCI account on the line of  
21 credit and there was \$200,000 of checks presented,  
22 but CCI had deposited \$1 million, it was your  
23 understanding that \$700,000 would be placed in an  
24 interest-bearing account on behalf of CCI, and it

65

1 would do that at the bank and access the line.

2 So, hypothetically, that's possible, too.

3 Q Hypothetically?

4 A Or in theory or reality.

5 Q How did CCI make borrowings in  
6 1999 under the revolving line of credit?

7 A Mechanically how?

8 Q Yes. What was the process?

9 A I guess mechanically we would  
10 either draw down on it or -- I guess by request or  
11 by presenting the checks.

12 Q Typically the line of credit was  
13 accessed by simply writing checks on CCI's bank  
14 account. Isn't that right?

15 A Could be.

16 Q Are you aware of any times when  
17 CCI requested money to be deposited in the account  
18 for the line of credit without checks being  
19 presented?

20 ---

21 (Whereupon the pertinent  
22 testimony was read back by the court reporter.)

23 ---

24 MR. BURKE: Objection to form.



66

1 You can answer.

2 A I don't know if that occurred or  
3 not.

4 BY MR. GEBHARDT:

5 Q **You just have no knowledge one  
6 way or another?**

7 A I suppose it could have occurred.

8 I would have to think of a scenario where it might  
9 have. I could not sit here and tell you that it  
10 did or did not occur.

11 MR. BURKE: Maybe now is a good  
12 time to take a break.

13 ---

14 (Whereupon there was a recess in  
15 the proceedings.)

16 ---

17 BY MR. GEBHARDT:

18 Q **That would be because Sheri  
19 Phillips was the person principally dealing with  
20 the line of credit with AllFirst?**

21 A Well, she handled the day-to-day  
22 accounting functions, if that's what you mean by  
23 that. She handled the day-to-day accounting  
24 functions. As far as your question you just asked

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1 me previously, I would imagine that it would be  
2 permissible under the loan documents to draw a  
3 line of credit in that fashion for maybe a  
4 purchase, for whatever. So, as far as accessing  
5 the line of credit, it would have been permissible  
6 to do it in the way you mentioned. Whether or not  
7 it was actually done or how many times it was  
8 done, I can't say.

9 Q **My question was, is that because  
10 Sheri Phillips was the person handling that  
11 function or that process, not you?**

12 A Not necessarily. It could just  
13 be the fact that sitting here three years later, I  
14 just don't recall.

15 Q **That's my question.**

16 MR. BURKE: I think he answered  
17 it.

18 BY MR. GEBHARDT:

19 Q **You don't recall?**

20 A I don't recall if that was done  
21 or not.

22 Q **Did you ever personally request  
23 an advance on the line of credit other than  
24 through writing a check from 1999 forward?**

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1 MR. BURKE: You, meaning the  
2 witness or CCI?

3 MR. GEBHARDT: The witness.

4 A I may have. I don't recall. I  
5 think the loan documents permitted me to do so. I  
6 just don't recall if the company, if we did or  
7 not, accessing in that fashion.

8 BY MR. GEBHARDT:

9 Q **Were you personally involved in  
10 the accounts payable or check-writing function of  
11 CCI?**

12 A If they were checks on a  
13 particular area that I had some issue with, I  
14 might have reviewed what was going out to certain  
15 vendors or contractors.

16 Q **Did you write the checks  
17 personally at all?**

18 A They were set up on a check  
19 writer.

20 Q **Did you operate the check writer  
21 at all in 1999 forward?**

22 A Did I operate the check writer?

23 Q **Yes.**

24 A No, I did not operate the check

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1 writer.

2 Q **Did you always sign the checks?**

3 A The check writer signed the  
4 checks.

5 Q **Whose signature did they bear?**

6 A Mine.

7 Q **Who was authorized to use the  
8 check writer?**

9 A There was a series of --  
10 depending on what it was for, project managers had  
11 certain authority to authorize disbursements,  
12 senior project manager had authority. There was a  
13 number of authority levels to execute checks or  
14 approve a check.

15 Q **Did Sheri Phillips have  
16 authority?**

17 A Did she have authority to?

18 Q **Have the check writer issue  
19 checks.**

20 A Yes, she had authority.

21 Q **Shane Miller, did he have  
22 authority?**

23 A Yes.

24 Q **And were most of the checks that**

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1 were written under the authority or the auspices  
2 of Sheri Phillips or Shane Miller?

3 A Checks would have been written  
4 under the authority of any three of us, but then  
5 there were also checks that other people in the  
6 company had authority to approve and submit.

7 Q Unless there was some actual  
8 issue you were concerned with, you didn't get  
9 involved in the process of issuing checks?

10 MR. BURKE: Objection to the  
11 form.

12 A Depending what it was.

13 BY MR. GEBHARDT:

14 Q Unless it was something you had a  
15 particular interest in, that's not one of the  
16 functions that you did on a day-to-day basis?

17 A It could also be a fact that it  
18 may be a situation where Shane Miller wasn't in  
19 town and so I reviewed checks for disbursement.  
20 It could have been an issue where Sheri wasn't in  
21 town. And so in the course of the year there  
22 were, I'm sure, many scenarios that came up. So  
23 there really was no one specific way that I'll say  
24 disbursements were handled.

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1 clerk was responsible to run a report at a certain  
2 point in time and mail it.

3 Q Did you have any personal  
4 involvement in that process?

5 A As far as writing the report  
6 myself?

7 Q As far as overseeing and making  
8 sure the report was submitted to AllFirst in  
9 accordance with the requirements with the line of  
10 credit.

11 A No. I assume that the bank  
12 received it. Otherwise, I would have been alerted  
13 by the bank that they had not received it.

14 Q I didn't say that they didn't  
15 receive it. I was just asking whether you were  
16 involved in the process of getting those reports  
17 to the bank and your answer is, I take it, no?

18 A I did not prepare the accounts  
19 receivable report to go to the bank.

20 Q I understand you didn't prepare  
21 it. You didn't oversee the preparation or the  
22 forwarding either, did you?

23 A Other than directing the  
24 department that it was to be done.

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1 Q It wasn't your customary  
2 day-to-day function to do that?

3 MR. BURKE: To do what?

4 MR. GEBHARDT: To issue checks or  
5 supervise the issuance of the checks.

6 A On day-to-day basis?

7 BY MR. GEBHARDT:

8 Q Yes.

9 A No, not on a day-to-day basis.

10 MR. BURKE: Take a break.

11 MR. GEBHARDT: Okay.

12 ---

13 (Whereupon there was a recess in  
14 the proceedings.)

15 ---

16 BY MR. GEBHARDT:

17 Q Were monthly accounts receivable  
18 agings provided to AllFirst in accordance with the  
19 commitment letter in 1999?

20 A To my knowledge they were.

21 Q Who was responsible for  
22 forwarding the accounts receivable aging to  
23 AllFirst?

24 A I would suspect probably an AR

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1 Q You were aware that it was being  
2 done?

3 A To the best of my knowledge, yes.

4 Q Now, there came a time in 1999  
5 when CCI requested credit from AllFirst in excess  
6 of the \$4 million revolving line of credit. Is  
7 that correct?

8 A Yes.

9 Q What was it that CCI requested of  
10 AllFirst in 1999?

11 A Are you referring to October,  
12 November of '99, that time frame?

13 Q When the request was first made,  
14 what did CCI ask?

15 A There was a request made in  
16 October of 1999 for additional borrowing.

17 Q In what amount?

18 A \$1 million.

19 Q And who made the request?

20 A I did.

21 Q And to whom did you make the  
22 request?

23 A It would have been made to Chris  
24 Schwartz and Mike Zarccone or Craig Schwartz who

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1 brought Mike Zarcone into it.

2 **Q How was it made?**

3 **Person-to-person meeting, telephone call?**

4 **A Telephone call, probably.**

5 **Q What was the reason CCI wanted an**  
6 **increase in credit facility beyond the \$4 million?**

7 **A We requested an additional loan**  
8 **of \$1 million to handle a -- basically function as**  
9 **a bridge loan.**

10 **Q Bridge loan from what to what?**

11 **A From roughly November to**  
12 **February.**

13 **Q What was the reason a bridge loan**  
14 **was needed?**

15 **A A projection had been run**  
16 **indicating that due to some winter shutdown and**  
17 **some other issues relative to the projects that**  
18 **our income, revenue income would not be -- would**  
19 **be decreased, mostly because work couldn't**  
20 **progress and also because we had -- there was an**  
21 **issue on two of our projects and that we needed --**  
22 **by our projection we needed about a million**  
23 **dollars for a 90-day period to get us through that**  
24 **period.**

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1 **Q A million dollars more than the \$4**  
2 **million ceiling that the line of credit provided?**

3 **A Well, it was an additional \$1**  
4 **million.**

5 **Q So you were asking for \$5 million**  
6 **total credit for CCI?**

7 **MR. BURKE: Objection to the**  
8 **form.**

9 **A If you were to add this note to**  
10 **the other borrowings, you would add 1 million to**  
11 **the other notes that were already in existence.**  
12 **BY MR. GEBHARDT:**

13 **Q Did CCI ask for the credit line**  
14 **to be increased from 4 million to 5 million?**

15 **A No. I believe we asked for an**  
16 **additional short-term loan.**

17 **Q And that was because a projection**  
18 **revealed that CCI's cash flow would be inadequate**  
19 **over that November-to-February period of time?**

20 **A Well, our projection showed we**  
21 **were going to be running very tight, let's put it**  
22 **that way, given a worst case scenario. We**  
23 **reviewed the cash flow projections and determined**  
24 **that a short-term bridge loan would be appropriate**

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1 or would be necessary as an option, as one of the  
2 options.

3 **Q And the two projects that there**  
4 **was a problem with or what?**

5 **A Well, the two projects we had**  
6 **problems with, which we indicated to the bank, was**  
7 **Scott Air Force Base and the Albemarle prison**  
8 **project.**

9 **Q And what was the problems that**  
10 **existed with those two projects?**

11 **A Well, in the case of the Scott**  
12 **Air Force Base, there had been an issue of**  
13 **acceleration that had been demanded by the**  
14 **government, and we had a large claim to submit to**  
15 **them, which we were working on, which the**  
16 **government was ready to receive and negotiate with**  
17 **upon receiving substantial completion. The other**  
18 **one was a prison project in Virginia which was**  
19 **really the result of a lot of design problems from**  
20 **the design firm.**

21 **Q And when you say acceleration had**  
22 **to be put into effect with the Scott Air Force**  
23 **Base, that was to be able to finish the project at**  
24 **the time the project was supposed to be finished?**

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1 **A They needed a portion of it to be**  
2 **ready at a certain period of time and directed us**  
3 **to accelerate in order to accomplish that.**

4 **Q Was the need for acceleration at**  
5 **all caused by CCI's not having performed in**  
6 **accordance with the normal construction schedule**  
7 **that had been intended at the beginning of the**  
8 **project?**

9 **A No. Acceleration was caused by**  
10 **some interference and project suspension on a**  
11 **portion of the project that the government had**  
12 **caused.**

13 **Q And CCI's claim was for cost**  
14 **overruns?**

15 **A Yes, well, cost overruns and for**  
16 **acceleration and delays that they had caused.**

17 **Q And the prison project, the**  
18 **design problems caused cost overruns also?**

19 **A It caused significant delays and**  
20 **costs associated with correcting the design.**

21 **Q What was the response of AllFirst**  
22 **to the request that you made on behalf of CCI?**

23 **A In the end they granted a**  
24 **short-term loan with a personal guarantee.**

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1        ---  
 2        (Whereupon the document was  
 3 marked for identification as Deposition Exhibit  
 4 No. 13.)  
 5        ---  
 6 BY MR. GEBHARDT:  
 7        Q     I've handed you what has been  
 8 marked as Deposition Exhibit 13 which is a file  
 9 memorandum prepared by Craig Schwartz on October  
 10 26th, 1999. Craig Schwartz was the account  
 11 officer for CCI in 1999. Is that correct?  
 12        A     I'm sorry. I was reading this.  
 13        Q     Was Craig Schwartz the account  
 14 officer for CCI in 1999?  
 15        A     Yes.  
 16        Q     Do you recollect having a meeting  
 17 at the end of October of 1999 with Craig Schwartz  
 18 in which Sheri Phillips also attended?  
 19        A     Yes. I believe it was also --  
 20 Mike Zarcone attended, I believe. There were a  
 21 number of meetings. I know he attended at least  
 22 one.  
 23        Q     Did you present a nine-month  
 24 statement in that meeting?

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1        A     I believe we did.  
 2        Q     Would it be correct, does this  
 3 memorandum indicate that the nine-month statement  
 4 showed a loss of 1.5 million?  
 5        A     That I don't recall.  
 6        Q     But you have no recollection that  
 7 that's not a true statement, you just don't know?  
 8        MR. BURKE: Objection to form.  
 9        A     Well, at that point, at the end  
 10 of the ninth month, internally prepared document,  
 11 it may have shown a \$1.5 million loss. Without it  
 12 in front of me, I couldn't tell you for sure.  
 13 BY MR. GEBHARDT:  
 14        Q     You have no recollection to  
 15 dispute the accuracy of that statement as you sit  
 16 here now?  
 17        A     Accuracy or inaccuracy, I don't  
 18 know what the exact number was without seeing the  
 19 document.  
 20        Q     Is it correct in accordance with  
 21 the last statement of this memorandum that there  
 22 was a projection of a \$2 million loss for your  
 23 end?  
 24        A     Do you want to give me a minute

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1 so I can read this?  
 2        Q     Sure.  
 3        A     Your question?  
 4        Q     Was it told to the bank that  
 5 there was a year-end anticipation for a \$2 million  
 6 loss?  
 7        A     We told them there was going to  
 8 be a loss at that point in time. I think we may  
 9 have said it may approach -- I think it was more  
 10 it may approach 2 million depending on recognition  
 11 of certain costs and claims and what have you.  
 12        Q     Was this meeting for the purpose  
 13 of discussing the million dollar increase?  
 14        A     This meeting here was the  
 15 discussion where I was requesting an additional  
 16 million dollars. In keeping with my practice with  
 17 the bank we gave them a worst case scenario  
 18 relative to where we thought the company would end  
 19 up financially.  
 20        Q     Was CCI paring back at this point  
 21 its operations?  
 22        A     We had cut back on our civil  
 23 division. Heading into that winter, as we were  
 24 closing down jobs we were paring back down, that

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1 is correct.  
 2        Q     And road construction work had  
 3 been done and was now being eliminated?  
 4        A     We weren't bidding any more road  
 5 work. So we were going to finish what we had and  
 6 then sell the division or liquidate or sell the  
 7 equipment.  
 8        Q     And the mechanical portion of the  
 9 business, as indicated in the memorandum, was  
 10 being phased out?  
 11        A     Mechanical, we were not -- the  
 12 projects we recently obtained we had subbed out  
 13 the mechanical work, and in order to conserve  
 14 costs we were cutting that division back, planned  
 15 to cut that division back also.  
 16        Q     These were not profitable  
 17 operations for CCI as of the time of this meeting?  
 18        A     The mechanical division?  
 19        Q     Mechanical and civil and road  
 20 that you're talking about.  
 21        A     The mechanical and civil  
 22 divisions had added revenue and profits to the  
 23 company. However, the cost of maintaining them,  
 24 we felt in order to cut our costs back we would



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1 have to cut those divisions way back. So it was  
2 more from a standpoint of overall reduction of the  
3 size of the company to save, cut costs.

4

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5 (Whereupon the document was  
6 marked for identification as Deposition Exhibit  
7 No. 14.)

8

---

9 BY MR. GEBHARDT:

10 Q Exhibit 14 is another file  
11 memorandum from Craig Schwartz referencing a  
12 meeting with you and Sheri Philip that was also by  
13 Michael Zarcone of AllFirst. Do you recollect  
14 this meeting?

15 A Yes.

16 Q This is a different meeting than  
17 the meeting referenced in Exhibit 13?

18 A That was the first meeting.

19 Q Yes.

20 A I think the way it came about, we  
21 had this initial meeting with Craig Schwartz, and  
22 the follow-up meeting then was the one I referred  
23 to where Michael Zarcone attended.

24 Q There's a reference to an

1 you had in mind when you made this statement to  
2 the bank?

3 A It could have been any number of  
4 sources, personally going to another bank and  
5 borrowing, could have been any number of sources.

6 Q What you're talking of, if I  
7 heard you correctly, there was the possibility of  
8 you putting in personally or going to another  
9 bank?

10 A If that's what -- you are talking  
11 about private sources, it would have been  
12 something other than AllFirst. So it would have  
13 been or could have been from those two sources you  
14 mentioned. I was certainly capable of doing it.

15 Q You didn't tell them you intended  
16 to go out and borrow \$500,000 from another bank  
17 did you?

18 A I think where I left it was that  
19 I could obtain \$500,000. I left it go at that. I  
20 wouldn't tell them I was going to another bank.

21 Q You basically told them you could  
22 put the money in, you or people associated with  
23 you?

24 A I don't recall exactly stating

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1 increase of a \$1.2 million done on a temporary  
2 basis. You were referencing a million dollar  
3 increase. Can you explain how it got from a  
4 million to a million two?

5 A Initially gone in and requested a  
6 million. That had been my request for a million.

7 Q How did it get from a million to  
8 a million two, then?

9 A I think after reviewing our  
10 financials and having the discussion with Craig  
11 Schwartz at the first meeting, they came back with  
12 an offer of 1.2 million.

13 Q There's a reference in here to,  
14 quote, CCI will get an additional \$500,000 from  
15 private sources, period, end quote.

16 Do you recollect having  
17 discussions about CCI obtaining an additional  
18 \$500,000 from sources other than the bank?

19 A I don't recall specifically, but  
20 that's not to say it may not have come up in  
21 conversation and I may have told them if we needed  
22 the additional \$500,000 that the company would be  
23 able to obtain it, other than from AllFirst.

24 Q And what were the private sources

1 that. That's not to say that didn't come up in  
2 conversation. All I'm saying is that I could  
3 have -- more than likely I could have raised  
4 \$500,000 from an outside source.

5

---

6 (Whereupon the document was  
7 marked for identification as Deposition Exhibit  
8 No. 15.)

9

---

10 BY MR. GEBHARDT:

11 Q I've handed you what has been  
12 marked as Exhibit 15 and purports to be a letter  
13 dated November 5, 1999 to you as president of CCI  
14 Construction from Craig Schwartz. Do you  
15 recognize your signature on the last page?

16 A Yes, I do.

17 Q And would I be correct that this  
18 is the commitment letter for the \$1.2 million that  
19 AllFirst extended to CCI in November of 1999?

20 A It would appear to be.

21 Q And now looking at the document,  
22 the use of loan proceeds is described in the  
23 identical same way as the use of loan proceeds in  
24 the \$4 million commitment. Isn't that correct?

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1 A Well, this one says work in  
2 progress, where I think the other one says work in  
3 process. So to the extent that would be the  
4 difference, I guess.

5 Q You don't recognize that as a  
6 material difference in what the meaning is, do  
7 you?

8 MR. BURKE: I'll object to the  
9 form to the extent the document speaks for itself.

10 A Work in progress, work in  
11 process, I don't know.

12 MR. BURKE: It's not identical.

13 A It's not identical.

14 BY MR. GEBHARDT:

15 Q The purpose of the million two  
16 was to provide funds to finance work in progress  
17 and accounts receivable. Correct?

18 A The intent was a short-term loan,  
19 a bridge loan to cover that time period from  
20 November to February.

21 Q Because there was a cash flow  
22 shortfall?

23 A We were projecting a cash flow  
24 shortfall.

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1 Q Caused by the receivables that  
2 you thought were due and payable particularly from  
3 the two projects, Scott Air Force Base and  
4 Albemarle Prison. Right?

5 A Those were two of the reasons as  
6 well as the fact that winter had set in, so  
7 receivables of all jobs were going to be slower  
8 because work couldn't progress. So we were  
9 projecting a cash flow shortfall. Whether or not  
10 in reality we would have had one, I don't know,  
11 but it was close enough where I felt it prudent to  
12 obtain additional funds to have in the event that  
13 the worst case scenario we were projecting came to  
14 pass.

15 Q How long was this -- was your  
16 intention to have the loan outstanding, this  
17 temporary facility?

18 A Our projections, we only needed  
19 it for 90 days.

20 Q Sufficient cash would come into  
21 the company to pay it?

22 A Those were what the projections  
23 were, indicating that the cash flow would increase  
24 after that.

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1 Q And so this cash increase would  
2 be used to repay the temporary facility?

3 A Well, our cash flow was projected  
4 to then increase within about 90 days, and as I  
5 indicated to the bank, that was the only amount of  
6 time that we needed and that we would pay it back.

7 Q And the commitment letter  
8 provides that it's to be repaid on March 31, 2000.  
9 Right?

10 MR. BURKE: Objection to the  
11 form. Where are you referencing, counsel?

12 MR. GEBHARDT: Next to last  
13 paragraph on the first page.

14 MR. BURKE: Where does it say it  
15 will be repaid on March 31?

16 MR. GEBHARDT: If no demand is  
17 made, the loan will expire and all borrowings will  
18 be due and payable together with interest on March  
19 31, 2000.

20 A Well, when I requested a million  
21 dollars for 90 days, what they came back with was  
22 they wanted to increase the amount, what they had  
23 given me as cushion and they wanted to increase  
24 the time frame, which I had requested, from 90 to

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1 120. So that is what they came back to. I  
2 reiterated to them that that was not necessary and  
3 was not what I requested. When I signed the note,  
4 he indicated he would have to go back and retype  
5 the note, or something to that effect, and really  
6 sat there and said, what's the difference, in 90  
7 days pay it.

8 BY MR. GEBHARDT:

9 Q The note doesn't have a due date,  
10 does it?

11 MR. BURKE: Objection to form.

12 A I would have to take a look at  
13 it.

14 MR. BURKE: The document speaks  
15 for itself.

16 BY MR. GEBHARDT:

17 Q Let's take a look at your note.

18 MR. GEBHARDT: Mark this as 16.

19 ---

20 (Whereupon the document was  
21 marked for identification as Deposition Exhibit  
22 No. 16.)

23 ---

24 BY MR. GEBHARDT:

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1 Q I've handed you Deposition  
2 Exhibit 16, which is a --

3 MR. GEBHARDT: Excuse me, let's  
4 mark this one as 17.

5 ---

6 (Whereupon the document was  
7 marked for identification as Deposition Exhibit  
8 No. 17.)

9 ---

10 BY MR. GEBHARDT:

11 Q Take a look at Deposition Exhibit  
12 17, which is a commercial loan note line of credit  
13 dated November 8, 1999. Do you recognize your  
14 signature on the last page?

15 A Yes, I do.

16 Q And that's the note that you  
17 signed on behalf of CCI for the \$1.2 million loan?

18 A Yes, it is.

19 Q Do you find any due dates  
20 specified on this note?

21 A No, I do not see one.

22 Q Would you agree that on Page 2 of  
23 the commitment letter there's the phrase we've  
24 seen before that, quote, all terms and conditions

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1 legal conclusion. You can answer.

2 MR. GEBHARDT: Say objection to  
3 form. I don't need you to educate me on why you  
4 think the form is wrong.

5 A My understanding -- the way it  
6 came about was that I made the request for a  
7 million dollars for 90 days because that's what we  
8 needed. The bank in their judgment came back to  
9 me at a meeting with a commitment for a million  
10 two for amounts to 120 days and presented both to  
11 me. I told them that I didn't need a million two,  
12 nor did I need 120 days. I requested 90 days and  
13 a million dollars. Mr. Schwartz indicated that he  
14 could not modify the letter by crossing it off.  
15 He would have to go back and have it retyped. And  
16 it was the end of the day and it was inconvenient  
17 and the statement to me was, if you want to pay it  
18 off in 90 days, go ahead and pay it off in 90  
19 days. This is a demand note. But I have put on  
20 here extra amount -- in the event you don't have  
21 to come back to me, and I'm giving you an extra 30  
22 days. I said I appreciated that, but that was not  
23 what I had requested.

24 After going back on the 4th, we

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1 contained herein shall survive execution of such  
2 loan documentation?

3 MR. BURKE: Are you asking if  
4 that's what it says?

5 MR. GEBHARDT: Yes.

6 A That's what it says.

7 BY MR. GEBHARDT:

8 Q So, your understanding, based on  
9 the commitment letter and promissory note, was  
10 that the actual \$1.2 million was not expected to  
11 be repaid or due until March 31, 2000?

12 MR. BURKE: Objection to form.

13 (Whereupon the pertinent  
14 testimony was read back by the court reporter.)

15 ---

16 A No, that's not my recollection.

17 BY MR. GEBHARDT:

18 Q You don't dispute that the  
19 commitment letter, which is to survive execution  
20 of the loan document, says that the loan is due on  
21 March 31, 2000, do you?

22 MR. BURKE: I'm going to object  
23 to form to the extent the documents will speak for  
24 themselves and to the extent he is asking for

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1 decided to execute the commitment letter and the  
2 note and leave it as it was. So the commitment  
3 letter and the note were signed at the same time.

4 BY MR. GEBHARDT:

5 Q The due date specified in the  
6 commitment letter which survives the execution of  
7 the note is March 31, 2000. Isn't that right?

8 MR. BURKE: Same objection.

9 A It is what the document says. It  
10 is not what -- my understanding nor what I had  
11 requested.

12 BY MR. GEBHARDT:

13 Q Even though you only wanted a  
14 million dollars, the full \$1.2 million was  
15 disbursed to CCI. Isn't that right?

16 A Yes, it was.

17 Q And the full \$1.2 million was  
18 used by CCI and its operations, wasn't it?

19 A Well, we took a deposit of the  
20 million two. Whether we actually used all million  
21 two, I don't know if that's a true statement.

22 Q But it was deposited in the  
23 checking account and reduced the borrowings under  
24 the \$4 million line of credit?

94

1 A Well, it was deposited into our  
2 account.

3 Q Which was the account tied in  
4 with the line of credit?

5 A Accounts tied in with cash  
6 management system. The only account we had, so  
7 that was the account it went into.

8 Q Now, this particular \$1.2 million  
9 loan was personally guaranteed by you. Isn't that  
10 right?

11 A Yes, it was.

12 Q And would it be fair to say that  
13 the AllFirst representatives expressed to you that  
14 they would not give CCI the additional loan  
15 without your personal guarantee?

16 A Yes, that's true.

17 Q And in connection with that  
18 requirement, you actually executed the suretyship  
19 agreement that is Deposition Exhibit 16. Isn't  
20 that right?

21 A Yes, I did.

22 ---

23 (Whereupon the document was  
24 marked for identification as Deposition Exhibit

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1 page, which is the recitation of assets and  
2 liabilities, you had a financial wherewithal to  
3 repay personally without the use of CCI funds, the  
4 \$1.2 million that had been borrowed?

5 A I would say probably December 31  
6 of '98, it appears that I had enough cash on hand.  
7 Whether or not I would have been able to liquidate  
8 or had the cash to pay, I had the assets.

9 Q So you would agree that at least  
10 as of December 31, 1998, you had available the  
11 cash to have repaid the \$1.2 million loan and  
12 probably at least as of the year 2000, you had  
13 assets or resources sufficient to enable you, had  
14 you chosen, to personally repay the \$1.2 million  
15 loan?

16 A Well, I don't know exactly -- I  
17 would have to see what it was at the end of 1999.  
18 But looking at 1998, I had the wherewithal to pay  
19 it back.

20 Q Prior to this financial statement  
21 that is Exhibit 18, had you ever provided the bank  
22 with a personal financial statement previously?

23 A I'm sure that I had at some point  
24 in time.

95

1 No. 18.)

2 ---

3 BY MR. GEBHARDT:

4 Q Exhibit 18 appears to be a  
5 personal financial statement for you that was  
6 prepared by CCI's accountants Brown, Schultz,  
7 Sheridan & Fritz. Do you recognize it as such?

8 A Appears to be.

9 Q And this is a statement of your  
10 assets and liabilities as of December 31, 1998.  
11 Right?

12 A Yes.

13 Q This was required by AllFirst  
14 before they would agree it to extend the  
15 additional \$1.2 million loan?

16 A I don't know if they got this  
17 before the loan or after, to tell you the truth.  
18 What's the date, the 9th, so I think they got this  
19 after.

20 Q And at the time this financial  
21 statement was submitted, was this an accurate  
22 recitation of your assets and liabilities?

23 A To the best of my knowledge.

24 Q Based on what I see on the last

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1 Q You can't remember when?

2 A Well it was probably when the  
3 original relationship began, and if there had been  
4 any personal guarantee of anything, I would have  
5 had -- most likely would have had to give them a  
6 personal financial statement.

7 Q This \$1.2 million loan was also  
8 secured by some equipment?

9 A It was secured by, what the  
10 document says, specific equipment financed  
11 including titled vehicles.

12 ---

13 (Whereupon the document was  
14 marked for identification as Deposition Exhibit  
15 No. 19.)

16 ---

17 BY MR. GEBHARDT:

18 Q Do you recognize Exhibit 19 as  
19 the security agreement pledging the equipment  
20 references in the commitment letter?

21 A It refers to the collateral, but  
22 there's nothing attached, so I don't know  
23 specifically what equipment.

24 Q There's no collateral description



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1 attached?

2 A Well, it says see attached  
3 schedule, and it's not included.

4 Q But you recognize your signature?

5 A Yes, I do.

6 Q That appears to be the agreement  
7 at least without an attached schedule that was  
8 executed as a security agreement in connection  
9 with \$1.2 million loan?

10 A Appears to be.

11 Q What was the reason for the  
12 pledge of the equipment?

13 A The bank asked for it.

14 Q Now, this was equipment other  
15 than equipment that had been financed through the  
16 \$2 million loan?

17 A It was equipment that was titled  
18 that we owned. I think that's what it says.  
19 Actually, what it says is specific equipment  
20 financed, but I don't know what specific equipment  
21 they were referring to, and then including titled  
22 vehicles.

23 Q So you don't know whether this  
24 equipment that was being referred to was also the

10

1 going on with the sale of the equipment that has  
2 just been pledged or purportedly pledged?

3 A Well, I'm going to assume --

4 MR. BURKE: Don't assume. If you  
5 know, answer.

6 A I know generally because we  
7 discussed it. There may have been equipment that  
8 they had asked to encumber where she would have  
9 given a list that we owned. And we were winding  
10 up our civil division, as we said, and selling the  
11 equipment as we were finished with it. So we  
12 requested a release -- requested authorization to  
13 sell that that had been encumbered by the million  
14 two and sold it at auction. So it appears in the  
15 face of the letter that we were requesting his  
16 authorization to sell the equipment at auction.  
17 BY MR. GEBHARDT:

18 Q Do you know what was sold?

19 A Specifically which pieces?

20 Q Right.

21 A Heavy equipment pieces. I  
22 couldn't tell you what particular backhoe or dozer  
23 or truck or whatever. Cross referencing, see the  
24 attached list to the note.

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1 same equipment that was purchased with the use of  
2 \$2 million loan or not?

3 A I don't know -- they wouldn't  
4 have been referring to that because they had  
5 already had UCC-1s filed on that equipment. So I  
6 doubt they would have wanted -- I don't know they  
7 would have gotten anything to ask for that for  
8 collateral here. So they must be referring to  
9 something else.

10 Q CCI didn't purchase any equipment  
11 with the use of the money from the \$2 million  
12 loan?

13 A I don't believe so.

14 ---

15 (Whereupon the documents were  
16 marked for identification as Deposition Exhibit  
17 Nos. 20 and 21.)

18 ---

19 BY MR. GEBHARDT:

20 Q Deposition Exhibits 20 and 21  
21 appear to be letters dated November 9, 1999  
22 between Craig Schwartz and Sheri Phillips  
23 regarding selling the equipment pledged for the  
24 \$1.2 million loan. Can you explain to me what was

10

1 Q Its permission to sell them, but  
2 you don't know whether specifically the items of  
3 equipment that were supposed to be attached on a  
4 schedule to the security interest were or were not  
5 sold?

6 A As we finished our use of the  
7 equipment, then were selling them at auction. So  
8 if that was one of the pieces that is going to  
9 sale, one of the pieces that had been pledged here  
10 as part of the security, then we made the request  
11 and, appropriately so, made the request to be  
12 released from that and sell it.

13 Q Do you know what happened to any  
14 proceeds of the sale with any of that equipment?

15 A They would have first gone to pay  
16 off any notes that were specifically on that  
17 equipment and the proceeds would have gone to our  
18 account.

19 Q To your knowledge, was there any  
20 document requesting that the proceeds from the  
21 sale of that equipment be used to reduce the \$1.2  
22 million?

23 A Letter requested from the bank?

24 Q Yes.

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1 A I don't remember seeing anything  
2 from the bank.

3 Q Where did you expect the funds to  
4 come from to repay AllFirst in the 90 days that  
5 you anticipated the \$1.2 million loan to be  
6 outstanding at the end of that time?

7 A Accounts receivable.

8 Q Collections from the normal  
9 course of business?

10 A Yes, or from the sale of  
11 equipment or whatever was occurring in that 90  
12 days that would have put money into our account.

13 Q Did you anticipate the \$4 million  
14 line of credit to have been paid to a zero balance  
15 at that time?

16 A At what time?

17 Q At the time the money came in to  
18 pay the million two.

19 A I don't believe there was any  
20 contemplation -- in other words, it would be a  
21 zero balance?

22 Q Right.

23 A Or, in other words -- no, I think  
24 the understanding from the bank was that that was

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1 credit?

2 A No.

3 Q Just not discussed?

4 A The only discussed part was, as I  
5 indicated, was the discussion that they understood  
6 that would be paid off within 90 days and that was  
7 going to be ahead of any payments on the \$4  
8 million line.

9 Q So, hypothetically, if the \$4  
10 million line had a \$2 million outstanding balance  
11 and a customer sent in a \$1.2 million of accounts  
12 or payables on CCI's billings, you expected to use  
13 the \$1.2 million coming in from the customer to  
14 pay off the million two loan and just leave the  
15 million dollar balance where it was?

16 MR. BURKE: Could you repeat that  
17 question?

18 BY MR. GEBHARDT:

19 Q Let me rephrase it.

20 Hypothetically, would it have  
21 been your understanding if we assume the \$2  
22 million outstanding on the line of credit and \$1.2  
23 million had come into CCI from a customer, that  
24 you could use that \$1.2 million to pay off the

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1 a revolving line and that would function as it  
2 always had, fluctuate up and down. In fact, I  
3 made it clear at the signing of the note that that  
4 \$1.2 million note would be paid prior to any time  
5 frame, whether it be a renewal.

6 Q The \$4 million line of credit  
7 commitment letter carried through April 30th and  
8 the one million two carried through March 31, so  
9 there was a disparity in dates, but did you have  
10 any discussions of whether the line of credit  
11 would or would not be brought to a zero balance  
12 before the million two was repaid or not?

13 A There was no specific requirement  
14 the bank placed on me.

15 Q I didn't ask you that. I asked  
16 you whether you had discussions with anyone from  
17 the bank on that topic.

18 A You need to be more specific, I  
19 guess. Just general discussions?

20 Q Yes. In the course of getting  
21 the million two, when you were discussing that,  
22 did you have any discussions about whether at the  
23 time you repaid the million two, you should have a  
24 zero balance on the \$4 million revolving line of

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1 \$1.2 million loan, without first reducing the \$1.2  
2 million loan, without first reducing the \$2  
3 million hypothetically outstanding under the line  
4 of credit?

5 MR. BURKE: Objection to form.

6 A If I chose to, sure. I believe  
7 that was my understanding and I believe that was  
8 the understanding that the bank had.

9 BY MR. GEBHARDT:

10 Q On February 11, 2000, the \$1.2  
11 million loan was repaid. Correct?

12 A Yes.

13 Q Who made the decision to make  
14 that payment to the bank on February 11, 2000?

15 A I did.

16 Q Did you consult with anyone else  
17 in the company about making that payment at that  
18 time?

19 A As I recall, there were  
20 discussions that I had reviewing the cash flow  
21 situation, where things were on the projects, with  
22 the company, and at the end of the discussion or  
23 those meetings or review or whatever, I decided  
24 that it would be best to pay that note off.

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1 Q You made the decision yourself?  
 2 A Yes.  
 3 Q And did you tell anyone else in  
 4 the company prior to making the payment that  
 5 that's what you were going to do?  
 6 A I think I believe I informed the  
 7 chief operating officer and obviously I informed  
 8 the chief financial officer.  
 9 Q You didn't ask their opinion,  
 10 whether it was in the best interest of the company  
 11 to pay the million two loan off at that time?  
 12 A Well, I did not ask the opinion  
 13 of Ms. Phillips. In conversations that day, the  
 14 day before, I think I made the statement that it  
 15 seemed to be in our best interest and consistent  
 16 with what I had stated to the bank that I would  
 17 do, and basically made the decision, made the  
 18 decision to pay that note back or pay the note off  
 19 or however you want to do it.  
 20 Q Who got the check written to make  
 21 the payment?  
 22 A What do you mean, got the check  
 23 written?  
 24 Q Did you handwrite the check?

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1 A No. I called Ms. Phillips and  
 2 told her to prepare a check.  
 3 Q This was signed by the machine's  
 4 signature, the check?  
 5 A No. It was a hand check. I  
 6 signed it.  
 7 Q So someone, either Ms. Phillips  
 8 or someone under Ms. Phillips' direction, wrote  
 9 out the check by hand and you signed it?  
 10 A No, just computer-generated and  
 11 called the accounts payable clerk. She would  
 12 basically go into the computer, make out the  
 13 check, hit the button and the check would be  
 14 generated.  
 15 Q The check writer wasn't used?  
 16 A We only used the check writer  
 17 because it was -- just when we had a long series  
 18 of checks to write and this was a series of checks  
 19 that day.  
 20 Q Making interest payments monthly  
 21 to the bank, though, you didn't hand-sign those  
 22 checks, did you?  
 23 A Well, because those were probably  
 24 regular, they would have been set up and printed

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1 with a series of checks.  
 2 Q Was the check writer used?  
 3 A I take that back. I think the  
 4 way the bank did it is they automatically debited  
 5 our account for interest. I would have to check  
 6 the bank records or their procedure as to how they  
 7 did it, but my understanding is that's how they  
 8 handled the interest.  
 9 Q Now, what was the procedure, what  
 10 was your involvement in the delivery of the check  
 11 to AllFirst?  
 12 A I took it to Mr. Schwartz to --  
 13 at his office.  
 14 Q You personally?  
 15 A Yes.  
 16 Q Why did you personally take the  
 17 check?  
 18 A Because I wanted to talk with  
 19 him, and it presented a very good opportunity for  
 20 me to have a discussion with him.  
 21 Q What did you want to discuss with  
 22 him?  
 23 A A couple of things. I wanted to,  
 24 one, thank him for acting quickly back in October,

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1 November, when we wanted to borrow the funds, for  
 2 acting quickly in approving it. Also to remind  
 3 him that I was pleased our projections had worked  
 4 themselves through. I was able to pay the note  
 5 when I said I had paid it, and also to talk with  
 6 him about the possibility or what would be  
 7 necessary if I ever wanted to come back and borrow  
 8 again. It presented also an opportunity to begin  
 9 a discussion depending on how the conversation was  
 10 going to what the next steps were in terms of I  
 11 knew the \$4 million line was going to be up for  
 12 renewal and started to talk to him about that.  
 13 So by taking the check over, it  
 14 presented a good opportunity for me to sit and  
 15 have an informal discussion with him.  
 16 Q Did you have an appointment?  
 17 A I called and I believe I had an  
 18 appointment with him, though he was not there.  
 19 Q You had an appointment and he  
 20 didn't show up?  
 21 A No. I called over and spoke to  
 22 either -- I really don't recall. It was either to  
 23 he or his assistant or secretary, whatever, who  
 24 indicated that he would be there at a certain time

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1 and I said fine, I would come over to see him.

2 **Q So you just said, I'm coming by?**

3 **A** I said I'm coming over, I wanted

4 to meet with him and leave my message, and it was

5 to pay the November note, pay it off.

6 **Q You did --**

7 **A** I don't recall, unfortunately,

8 whether I spoke to him directly or to his

9 assistant, but in either event, I said the same

10 thing to either one, that I was coming over to see

11 him, and that's when I went to the bank.

12 **Q You told them you were coming to**

13 **pay off the million two loan?**

14 **A** I believe so. I said I was

15 coming to see him to pay off the note we had in

16 November.

17 **Q When you got there, Mr. Schwartz,**

18 **as you said, was not present?**

19 **A** No, he was not.

20 **Q So you never met with him on the**

21 **day that you delivered the check?**

22 **A** Now, I waited for awhile. I

23 think the woman there said he would be returning

24 or she thought he would be returning from a

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1 meeting shortly, so I waited.

2 **Q How long did you wait?**

3 **A** Half hour, 40 minutes maybe,

4 maybe along those lines.

5 **Q And you didn't take the check**

6 **with you when you left, though?**

7 **A** Well, I started to, but the woman

8 there asked if she could help me. I told her why

9 I was there and she said if I wanted to, she could

10 take care of it.

11 **Q So you gave her the check?**

12 **A** Yes, I gave her the check.

13 **Q And told her which loan it was**

14 **paying off?**

15 **A** I said it was paying a loan off.

16 I think she looked it up in her system and asked

17 me if I wanted a receipt and I said sure, took a

18 receipt, left a message for Craig to call me when

19 he got back. She apologized that he wasn't there

20 or he must have left the meeting and gone to lunch

21 or something to that effect, but he was still

22 expected back that day.

23 **Q So solely because the lady asked**

24 **to help you is the reason you left the check?**

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1 **A** I believe so. She ask me if she

2 could help me and I told her why I was there and

3 she said she could take care of that if I wanted.

4 **Q In practical effect there would**

5 **have been no difference in making the payment on**

6 **that Friday as opposed to the next Monday?**

7 **MR. BURKE:** What's the question?

8 **A** Is there a question?

9 ---

10 (Whereupon the pertinent testimony

11 was read by the court reporter.)

12 ---

13 **MR. BURKE:** Object to the form.

14 I don't believe that's a question.

15 **A** Probably not, no.

16 **BY MR. GEBHARDT:**

17 **Q When you requested the check, you**

18 **understood that writing that check would result in**

19 **a draw upon the \$4 million line of credit?**

20 **A** It may or may not have.

21 **Q Did you know that writing the**

22 **check would result in a draw on the \$4 million**

23 **line of credit?**

24 **A** Well, depending on how the bank

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1 was accounting for, that could have been the case.

2 **Q You knew at the time the check**

3 **was written that CCI had an outstanding balance on**

4 **the line of credit, didn't you?**

5 **A** I think, yes.

6 **Q And you knew that writing that**

7 **check would increase the outstanding balance on**

8 **the line of credit?**

9 **MR. BURKE:** Objection, asked and

10 answered. You can answer it again.

11 **A** Well, do you want to ask the

12 question again or repeat it?

13 ---

14 (Whereupon the pertinent

15 testimony was read by the court reporter.)

16 ---

17 **A** That would depend on whether or

18 not there were funds still sitting in our account

19 that would not have been swept by the bank and

20 their cash management system. So to the extent

21 there were funds prior to that, then I guess there

22 would have been a zero impact.

23 **BY MR. GEBHARDT:**

24 **Q But you didn't know that.**



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1 MR. BURKE: Didn't know what?  
 2 BY MR. GEBHARDT:  
 3 Q Whether there were any deposits  
 4 that had been made that day?  
 5 A That were sitting in our account?  
 6 Q Yes.  
 7 A I know funds had recently come  
 8 in, so I believe there were funds sitting in the  
 9 account, but I couldn't tell you how much.  
 10 Q Did you verify what the  
 11 outstanding balance was or what the deposits had  
 12 been?  
 13 A I verified what our overall  
 14 balance was.  
 15 Q So then you knew that writing  
 16 that check would constitute a draw on the line of  
 17 credit?  
 18 A No.  
 19 MR. BURKE: Objection, asked and  
 20 answered. You can answer again.  
 21 A It would have drawn a line of  
 22 credit only to the extent that the funds had  
 23 possibly been swept by the cash management system.  
 24 BY MR. GEBHARDT:

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1 Q What time did you go into  
 2 AllFirst, in the afternoon, after lunch, wasn't  
 3 it?  
 4 A Late morning, early afternoon,  
 5 somewhere in that time frame.  
 6 Q Before you left, you would have  
 7 verified the status of the account that had the  
 8 line of credit facility?  
 9 A Either that or the night before.  
 10 Q And based on the information that  
 11 you had available to you at the time you wrote the  
 12 check, you were of the belief that writing that  
 13 check would require a draw on the line of credit?  
 14 MR. BURKE: Objection for the  
 15 fourth time to the extent that question has been  
 16 asked and answered. I'll let my client answer it  
 17 one more time.  
 18 A Depending on whether or not funds  
 19 had been moved from our account into the cash  
 20 management system, then there would have been no  
 21 impact on the line. To the extent that there was,  
 22 then there would have been an impact theoretically  
 23 on the line.  
 24 BY MR. GEBHARDT:

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1 Q I understand that, how it works.  
 2 What I'm asking you, your personal belief, at the  
 3 time you wrote the check based on your inquiry as  
 4 to the status of the account and so on, your  
 5 understanding was that writing that check would  
 6 require a draw on the line of credit?  
 7 MR. BURKE: I object and I am  
 8 going to ask the court reporter to read back the  
 9 previous instances where that question has been  
 10 asked and answered.  
 11 MR. GEBHARDT: The question  
 12 stands as it is. You have a question pending,  
 13 phrased differently and he can answer this  
 14 particular question as to his personal  
 15 understanding of the account status.  
 16 MR. BURKE: Read back the last  
 17 question, please.  
 18 ---  
 19 (Whereupon the pertinent  
 20 testimony was read by the court reporter.)  
 21 ---  
 22 MR. BURKE: Objection again.  
 23 This answer has been asked five times of this  
 24 witness and apparently counsel keeps asking the

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1 same question with the hopes of a different  
 2 answer. I'll let the witness answer the question  
 3 again.  
 4 MR. GEBHARDT: Let me phrase it  
 5 correctly because the witness has not yet answered  
 6 the question.  
 7 BY MR. GEBHARDT:  
 8 Q You indicated you verified the  
 9 status of the account and the line before you  
 10 wrote the check. Right?  
 11 A I verified that funds had come  
 12 into the company from various sources.  
 13 Q What funds?  
 14 A Off projects, sale of equipment.  
 15 Q You knew the amount of funds that  
 16 had come in?  
 17 A We had taken in some large  
 18 deposits. Our deposits had increased as we had  
 19 projected them to do so.  
 20 Q Did you quantify what those  
 21 deposits were before you wrote the check?  
 22 A Yes. I knew generally the dollar  
 23 amount that we recently had taken in over the  
 24 course of the previous couple of days, even that



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1 day.

2 **Q It was your view at the time you**  
3 **wrote that check that writing that check would not**  
4 **require a draw on the line of credit?**

5 MR. BURKE: Objection, asked and  
6 answered. Answer it again.

7 A To the extent that funds had not  
8 been swept out of our account by the cash  
9 management system, there would have been no impact  
10 to the line. To the extent that there was a  
11 difference, then by use of the cash management  
12 system, funds would have been taken from that.  
13 BY MR. GEBHARDT:

14 **Q The question still remains, I**  
15 **understand to the extent there were collections,**  
16 **to the extent there was this, this is how it would**  
17 **work. My question to you still is, when you wrote**  
18 **the check and handed it in to AllFirst, did you**  
19 **believe that you were making a borrowing on behalf**  
20 **of CCI under the line of credit or did you think**  
21 **that were sufficient deposits to cover the**  
22 **payment, you personally at the time you wrote it?**

23 MR. BURKE: Objection, asked and  
24 answered.

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1 (Whereupon the pertinent  
2 testimony was read by the court reporter.)

3 ---

4 A Rephrase that, collected the  
5 money.

6 BY MR. GEBHARDT:

7 **Q CCI's cash flow problems had**  
8 **increased as of February 2000 beyond what they**  
9 **were in November of 1999, isn't that true?**

10 A No, I don't believe that to be  
11 the case.

12 **Q Isn't it a fact that CCI over the**  
13 **next five months, counting from February, was**  
14 **anticipating substantial cash flow shortfalls?**

15 MR. BURKE: What time frame?

16 MR. GEBHARDT: Five-month period  
17 counting from February of 2000.

18 MR. BURKE: No, the time frame is  
19 when did CCI anticipate?

20 MR. GEBHARDT: From February.

21 A You have to give me the time  
22 frame to which to refer to, the date of February  
23 11th?

24 BY MR. GEBHARDT:

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1 BY MR. GEBHARDT:

2 **Q I understand what could have**  
3 **occurred and might have occurred and different**  
4 **things, but what did you think was the situation**  
5 **when you wrote the check and handed it in?**

6 MR. BURKE: Same objection. Go  
7 ahead.

8 A I thought or believed that there  
9 were some funds still in our account that had not  
10 been swept because there hadn't been time. Those  
11 funds were available. That in the tally of it, we  
12 had funds available to pay this note off. And so  
13 I instructed the check was to be drawn. Whether  
14 or not there was impact on the bank's records on  
15 the line of credit or not, I can't say. You have  
16 to go over the bank's records and see what, if  
17 any, impact there would have been.

18 **Q In fact, CCI had not collected**  
19 **the cash that it had anticipated collecting when**  
20 **the \$1.2 million was borrowed, isn't that true?**

21 MR. BURKE: Objection to form.

22 You can answer.

23 A Say that again.

24 ---

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1 **Q February 11th, you knew that CCI**  
2 **was having cash flow problems on February 11th,**  
3 **didn't you?**

4 MR. BURKE: Objection to form.  
5 You can answer.

6 A I knew that CCI had cash flow  
7 problems, issues when I talked to the bank in  
8 November, which we clearly told them about. And I  
9 would have to say by February 11th, it appeared as  
10 though cash flow problems had improved somewhat,  
11 but we still had some issues.

12 BY MR. GEBHARDT:

13 **Q You're saying you thought that**  
14 **CCI's cash flow position had improved as of**  
15 **February 11, 2000 beyond what they were in**  
16 **November of 1999?**

17 A Well, I would have to look at the  
18 report, whatever cash report we may have had in  
19 November, and compare it to a cash flow report we  
20 might have gotten at the end of January or  
21 February, and I could more specifically tell you.

22 **Q I'm not asking for the specific**  
23 **numbers. I'm asking whether at the time you wrote**  
24 **the check, was it your understanding that CCI had**

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1 a cash flow problem that was worse than it had in  
2 November when the money was borrowed?

3 A No, I don't believe it was worse.

4 Q You thought it was better?

5 A Well, I think it had improved  
6 somewhat.

7 Q And by somewhat, what do you  
8 mean?

9 A By problem, what do you mean?

10 Q By problem, I mean not having  
11 sufficient money to operate the company.

12 A Well, we had enough money to  
13 operate the company at that point, so I guess by  
14 your definition we didn't have a problem.

15 Q You understood that over the  
16 succeeding months CCI was not going to have  
17 sufficient funds to operate, didn't you?

18 A On what date?

19 Q As of February 11th.

20 A Not necessarily. I knew that we  
21 had not necessarily cleared all of our problems,  
22 but the problem you're saying, we didn't have  
23 enough money to operate, clearly wasn't the case  
24 on February the 11th.

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1 Q We've established you made the  
2 payment on behalf of CCI on February 11, 2000.  
3 And I think it's also without dispute there was a  
4 meeting held in which you attended and there were  
5 representatives of AllFirst on February the 18th.  
6 Does February the 18th accord with your  
7 recollection?

8 A On February 18th, I asked for a  
9 meeting with Mr. Schwartz and Mr. -- well, Mr.  
10 Schwartz, probably.

11 Q And there was a meeting that  
12 actually was held on February the 18th. Correct?

13 A Yes.

14 Q That was a Friday?

15 A Okay.

16 MR. BURKE: Do you know if it was  
17 a Friday or not?

18 BY MR. GEBHARDT:

19 Q If you need a calendar, we can  
20 get one. Was it a Friday?

21 A Was it a Friday?

22 Q Yes.

23 A Okay.

24 Q You called Mr. Schwartz to ask

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1 for the meeting?

2 A As I recall.

3 Q Let's assume, and I'll represent

4 to you that February 17th was a Friday and, of  
5 course, February 11th was then a Friday, when did  
6 you call Mr. Schwartz to set the meeting up?

7 MR. BURKE: February 17th was a  
8 Friday or February 18th was a Friday?

9 MR. GEBHARDT: February 18th is a  
10 Friday and February 11th is a Friday and the  
11 meeting was February the 18th.

12 BY MR. GEBHARDT:

13 Q My question is: You had payment  
14 on a Friday and a meeting the succeeding Friday.  
15 When did you call Mr. Schwartz to set up the  
16 meeting of February the 18th?

17 A I think I called the morning of  
18 the 18th.

19 Q The morning?

20 A I think.

21 Q So the meeting was in the  
22 afternoon?

23 A I believe so, yes.

24 Q Now, when you attended that

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1 meeting, who was present?

2 A Well, let's see, the meeting was  
3 supposed to be with Mr. Schwartz and Mr. Zarcone,  
4 but also in attendance were about five to six  
5 other people from the bank, plus two people on the  
6 speaker phone.

7 Q I can represent to you that those  
8 were Mr. Elias and Mr. Gibson.

9 A On the phone?

10 Q On the phone, yes. You saw Mr.  
11 Schwartz there and you saw Mr. Zarcone there?

12 A Yes.

13 Q And the other people who may have  
14 been there you don't recollect?

15 A Mr. Meyers, Mr. Trout, two or  
16 three others.

17 Q Now, did you ask for all these  
18 people to be in attendance?

19 A No.

20 Q Do you have any understanding of  
21 why all these people attended the meeting?

22 A No.

23 Q You called up Mr. Schwartz to say  
24 I would like to meet with you this afternoon and

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1 you have five people in a meeting and two people  
2 on an extension phone?

3 A That's right.

4 Q And did that surprise you?

5 A Yes.

6 Q Did you ask why is everybody here  
7 or something to that nature?

8 A Yes.

9 Q And what were you told?

10 A There really wasn't much of an  
11 answer.

12 Q Did you tell the bank there were  
13 major problems with CCI when you called Mr.  
14 Schwartz?

15 MR. BURKE: Objection to form.

16 You can answer.

17 A When I called Mr. Schwartz, I  
18 said I would like to come in and talk with you,  
19 that we received an update to some project reports  
20 and that it looked like the problem with Scott Air  
21 Force Base in particular had not moved forward to  
22 the extent I had hoped and I wanted to come in and  
23 sort of talk to him and tell him, keep him  
24 informed and tell him where we were at.

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1 A No.

2 Q When did you contact Mr.  
3 Chernicoff?

4 A I had talked to Mr. Chernicoff  
5 for the first time that morning.

6 Q So Mr. Chernicoff had not  
7 represented CCI or you prior to this meeting on  
8 February 18th?

9 A Well, the attorneys that I  
10 typically use, I'll say corporate counsel, is  
11 located in Pittsburgh, and so I had asked for a  
12 recommendation for an attorney in Harrisburg who  
13 was used to dealing with loan documents, bank loan  
14 documents.

15 MR. BURKE: I will caution the  
16 witness not to reveal any communications he may  
17 have had with his lawyer or CCI's lawyer regarding  
18 anything.

19 A Okay. Anyway --

20 MR. BURKE: What's the question  
21 again?

22 BY MR. GEBHARDT:

23 Q Had Mr. Chernicoff at any time  
24 represented CCI or Mr. Ortenzio individually prior

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1 BY MR. GEBHARDT:

2 Q Did you tell him CCI had suffered  
3 as of year end a \$6 million loss?

4 A In the phone conversation?

5 Q Yes.

6 A I don't believe so -- I don't  
7 recall.

8 Q Did you attend by yourself?

9 A I had intended to, but at the  
10 meeting I did not.

11 Q And who attended with you?

12 A Bob Chernicoff attended.

13 Q This is the same Mr. Chernicoff  
14 whose office we're in now?

15 A Yes.

16 Q And did you understand at the  
17 time of that meeting that Mr. Chernicoff was a  
18 bankruptcy lawyer?

19 A No, I did not.

20 Q You had no idea he was bankruptcy  
21 lawyer?

22 A No. You mean as far as that  
23 being his known specialty?

24 Q Right.

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1 to that February 18th date?

2 A No.

3 Q He was called for the first time;  
4 then, by you on February 18th?

5 A Yes. I met him for the first  
6 time.

7 Q At what time did you meet with  
8 him?

9 A I think I met him probably two  
10 hours before I was on my way to the bank.

11 Q And you retained Mr. Chernicoff  
12 based on a recommendation from the company's  
13 counsel in Pittsburgh?

14 MR. BURKE: When you say you, do  
15 you mean CCI?

16 MR. GEBHARDT: CCI.

17 MR. BURKE: Let me just speak  
18 with my client regarding the attorney/client  
19 privilege issue. You're asking for substantive  
20 substance of the communication.

21 MR. GEBHARDT: He already said he  
22 was referred to Chernicoff by lawyers in  
23 Pittsburgh and I would like a clear answer to the  
24 statement and I don't think there's any

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1 confidentiality of communication expressed in  
2 that.

3 MR. BURKE: I'll let him answer  
4 that so long as it is understood no waiver of  
5 attorney/client privilege.

6 BY MR. GEBHARDT:

7 Q The company's lawyers in  
8 Pittsburgh recommended Mr. Chernicoff.

9 MR. BURKE: I want your  
10 representation that there's no waiver of  
11 attorney/client privilege.

12 MR. GEBHARDT: There's no waiver  
13 of attorney/client privilege.

14 MR. BURKE: Did the Pittsburgh  
15 lawyers recommend Chernicoff?

16 A I'm not sure which one in their  
17 firm recommended him.

18 BY MR. GEBHARDT:

19 Q The question is, did the  
20 Pittsburgh lawyers recommend Mr. Chernicoff? It  
21 could be answered yes or no.

22 A Actually, no, it was an attorney  
23 in Harrisburg that had recommended that I see Bob  
24 Chernicoff.

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1 Q This attorney in Harrisburg, was  
2 this an attorney of CCI's?

3 A Yes. The firm we had retained,  
4 we always had.

5 Q Which firm was this?

6 A Eckert Seaman's.

7 Q And they have a Pittsburgh  
8 office, of course?

9 A Yes, they have a Pittsburgh  
10 office and a Harrisburg office.

11 Q What's the name of the attorney  
12 that you talked to?

13 A There was an attorney in  
14 Pittsburgh I talked to who dealt with construction  
15 issues and an attorney in Harrisburg, just general  
16 advice, so to speak, more of a friend than  
17 anything, and because the bank documents I had --  
18 I needed to renegotiate my line of credit with  
19 AllFirst bank at some point in time coming up, and  
20 they declined because they said that it was touchy  
21 because they represented AllFirst also, so they  
22 had a little bit of a conflict there. And I said  
23 I still need somebody to help, still want to get  
24 into bank documents, loan documents, restructuring

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1 my loan, which will be done in 60 days, I said, so  
2 I need a recommendation of somebody who is  
3 familiar, knowledgeable with bank documents and  
4 maybe has experience dealing with the people at  
5 AllFirst.

6 Q Did you have any understanding  
7 when you called Mr. Chernicoff that he practiced  
8 in the area of bankruptcy law?

9 A No.

10 Q You didn't know that at all?

11 A No. Had I known that, I would  
12 not have taken him to the meeting.

13 Q But you came to find that out  
14 sometime after the meeting?

15 A Yes.

16 Q When did you first find out Mr.  
17 Chernicoff practiced in the area of bankruptcy  
18 law?

19 A It probably didn't hit me that  
20 that was a specialty of his probably for, I guess,  
21 a week or ten days.

22 Q But you did come to recognize  
23 eventually that bankruptcy law was a specialty of  
24 Mr. Chernicoff?

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1 A Yes.

2 Q Why is it you felt the need to  
3 take a lawyer to the meeting with the bank to  
4 discuss your line of credit?

5 MR. BURKE: I'm going to object  
6 to the extent the question calls for Mr. Ortenzio  
7 to reveal attorney/client communication, and I'll  
8 confer with him about this.

9 MR. GEBHARDT: Let me say the  
10 attorney/client privilege pertains to confidential  
11 communications. It does not pertain to  
12 information or the witness's personal beliefs or  
13 views. My question was, why did he feel the need  
14 to obtain an attorney to go to the meeting. I  
15 haven't ask him what the attorney said, what he  
16 discussed with him or anything.

17 MR. BURKE: If the witness felt  
18 the need to bring an attorney to the meeting based  
19 upon advice given to him by counsel, it does call  
20 for an attorney/client communication which is  
21 privileged and you're not entitled to.

22 BY MR. GEBHARDT:

23 Q Is that the statement, you  
24 retained Mr. Chernicoff because you were advised



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1 by counsel?

2 MR. BURKE: The question was why  
3 did Mr. Ortenzio feel the need to bring Mr.  
4 Chernicoff to this meeting and if that was based  
5 on advice given to him by counsel, then it is a  
6 privileged communication.

7 MR. GEBHARDT: Well, I haven't  
8 asked for what the advice was.

9 MR. BURKE: Yes, you have.

10 MR. GEBHARDT: I've asked him why  
11 he felt the need to bring Mr. Chernicoff to the  
12 meeting. If he's going to tell me that was based  
13 on advice of counsel, that's the answer and  
14 perhaps I am not entitled to ask him what that  
15 advice was, but I'm entitled to know if there's a  
16 privilege being asserted and why it's being  
17 asserted.

18 MR. BURKE: Answer it. Unless  
19 you need to confer with me.

20 A I might as well take the  
21 opportunity to confer with you, I guess.

22 ---

23 (Whereupon the document was  
24 marked for identification as Exhibit Nos. 22, 23

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1 I know if they used the word adversarial, where  
2 there would be a disagreement or an argument, we  
3 can't represent you because you have a conflict.  
4 I said, well -- I was somewhat upset about that  
5 because these had been my attorneys for 12 years.

6 So after expressing my  
7 disappointment in them, I asked them for a  
8 recommendation, somebody that I could then talk to  
9 that they would recommend to basically function  
10 what I asked them to function, basically help  
11 participate in renegotiating for the most part \$4  
12 million line of credit facility. They hung up and  
13 said they'd call me back. They called the  
14 Harrisburg office and the Harrisburg office called  
15 me and suggested the firm Cunningham Chernicoff  
16 and I never heard of them before. I said fine. I  
17 said, do you have a phone number, got a phone  
18 number.

19 I called and spoke to -- I'm not  
20 quite sure who I spoke to on the phone. Basically  
21 I got a recommendation from Eckert Seaman's --  
22 point in fact, they had called in advance because  
23 I asked them, call them, tell them I'm going to  
24 call, at least so when I do call, they understand

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1 and 24.)

2 ---

3 MR. BURKE: Mr. Gebhardt, if you  
4 will stipulate if there's no waiver of  
5 attorney/client privilege, I will permit Mr.  
6 Ortenzio to explain the circumstances under which  
7 Mr. Chernicoff attended that meeting. Are we  
8 agreed?

9 MR. GEBHARDT: Yes.

10 MR. BURKE: Go ahead.

11 A I called Eckert Seaman's and told  
12 them that very shortly I was sure that I was going  
13 to have to get into some negotiations,  
14 discussions, whatever you want to call it,  
15 negotiations with AllFirst bank concerning the  
16 renewal of our \$4 million line of credit facility  
17 and that it was quite possible that it might get  
18 adversarial, but I was sure we could reach an  
19 agreement that both companies could live with.

20 In that point of the  
21 conversation, because I had already taken the  
22 various notes, they said look, we have a conflict.  
23 If you think there's any way there could be  
24 anything that might be, that might be -- I don't

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1 where I'm coming from, I'm being recommended by  
2 you guys. Fine, they did. I don't know who they  
3 spoke to. I said you call and I'll wait and then  
4 I'll call later, which I did. I spoke to -- I  
5 think I spoke to the secretary or somebody here, I  
6 would like to come in, was referred by Eckert  
7 Seaman's, blah, blah, blah, came in here, as a  
8 matter of fact --

9 MR. BURKE: Don't go into details  
10 of communications, just give the general.

11 A Bob Chernicoff came in and  
12 introduced himself and said what's the situation.  
13 I said I have these loan documents, kind of went  
14 through the whole thing, I am going to have to  
15 renegotiate it, could become a little bit  
16 adversarial, I said, but I think at the end of the  
17 day they have been with me for a long time, we  
18 will be able to work it out in some fashion.

19 Then we wrapped it up and I said  
20 I have a meeting at the bank, just moved from Camp  
21 Hill to downtown, to meet with Craig Schwartz or  
22 Mike Zarcone. I was on my way out and he stopped  
23 and he said, look, do you think I should attend  
24 and go along with you. I said I didn't see it



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1 necessary. I said, I'm just really going down to  
2 talk to them, I called for the meeting. And he  
3 said I know the people there and if you're going  
4 to get into discussions relative to these notes,  
5 whatever, he said, maybe I should be there. I  
6 said fine, come along, he's right downtown. And  
7 so he said yes, so he followed me down and he came  
8 along with me. Mostly he sat there and took notes  
9 of the meeting, who said what, that kind of stuff.  
10 MR. BURKE: That's good.  
11 BY MR. GEBHARDT:  
12 Q When did you have the discussion  
13 with the attorneys from Eckert Seaman's in which  
14 they conveyed they had a conflict and recommended  
15 Mr. Chernicoff?  
16 A I think it was the afternoon  
17 before.  
18 Q So the meeting and all occurred  
19 on Friday, this was Thursday?  
20 A I believe it was Thursday, yes.  
21 Q You wouldn't have called Mr.  
22 Chernicoff until Thursday afternoon, Friday  
23 morning?  
24 A If I called him, it would have

1 adversarial?

2 A I didn't.

3 Q You just said that you related to  
4 the lawyers from Eckert Seaman and to Mr.  
5 Chernicoff that you thought the meeting might be  
6 adversarial?

7 A That's not what I said.

8 MR. BURKE: Objection.

9 BY MR. GEBHARDT:

10 Q Tell me what you meant.

11 A I said the renegotiating of the  
12 \$4 million credit facility, which was due to be up  
13 for renewal, 60 days maybe, something like that,  
14 45, 60 days, maybe 90, if you take the 30-day  
15 notice provision, I thought that that might  
16 possibly become adversarial. There was a  
17 possibility.

18 Q Why did you think it might  
19 possibly become adversarial?

20 MR. BURKE: The renegotiations?

21 BY MR. GEBHARDT:

22 Q The meeting, whatever you thought  
23 might be adversarial.

24 A They asked me if I thought that

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1 been like the very end of the day. I didn't call  
2 him. I called the firm. It was the very end of  
3 the day, the 17th or first thing in the morning on  
4 the 18th.  
5 Q Did you call him before you set  
6 the meeting up with the bank or after?  
7 A I spoke to him after.  
8 Q After you called Craig Schwartz  
9 to arrange the meeting?  
10 A I had already gotten a meeting  
11 with Craig Schwartz by the time that I made  
12 contact with the firm here. Actually, it wasn't  
13 Bob Chernicoff. It was just the firm.  
14 Q I think you said you called Craig  
15 Schwartz on that morning.  
16 A I think it was that morning and I  
17 said I had called here either the end of the day  
18 Thursday or first thing Friday morning, but all I  
19 left was a message. I didn't speak to anybody.  
20 Q Here, the law firm rather than  
21 the bank?  
22 A Here.  
23 Q Why did you think the meeting  
24 that you were planning with the bank might be

1 it might be, and I said it's possible.

2 Q But why?

3 A I think because -- just simply  
4 because the company was in a fight with its -- one  
5 of its main -- the owners of the Scott Air Force  
6 Base, we were having problems on another project,  
7 that it's possible it might become adversarial. I  
8 didn't say that it would and quite frankly,  
9 hopefully that it wouldn't be, but I said it might  
10 become as a possibility. They asked me the  
11 question and I said, well, it's possible. When I  
12 said it was possible was when they, then, whatever  
13 you guys call it, conflict, recuse ourselves,  
14 whatever. We don't want to get into it with you  
15 if there's an outside possibility it might, and I  
16 said fine, and that's when the switch was made.

17 Q You at CCI had been dealing with  
18 Dauphin Deposit and AllFirst from 1990 forward.  
19 Had you had a good relationship with the bank?

20 A I thought we did.

21 Q Basically they tried to  
22 accommodate your credit needs and requirements for  
23 the business?

24 MR. BURKE: You, meaning CCI?

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1 MR. GEBHARDT: Yes.

2 A I would say so, yes.

3 BY MR. GEBHARDT:

4 Q And all this had gone along for a  
5 minimum, at least 9, almost 10 years and now  
6 you're having a meeting you think might possibly  
7 be adversarial?

8 MR. BURKE: I'm going to object  
9 to the misstatement of his testimony for a second  
10 time. He didn't say the meeting would be  
11 adversarial.

12 BY MR. GEBHARDT:

13 Q Not the meeting, the negotiation  
14 of the documents. Why did you think the  
15 negotiation of the renewal of the line of credit  
16 might become adversarial?

17 A That was the term Eckert Seaman's  
18 used, questioning me as to whether or not it might  
19 become adversarial or have some difficulties or  
20 something to that effect. All I said was, I can't  
21 rule it out. It's possible.

22 Q Why couldn't you rule it out?

23 A What's that?

24 Q Why couldn't you rule it out?

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1 MR. BURKE: Objection, asked and  
2 answered. Go ahead and answer.

3 A Because it's in the realm of  
4 possibility.

5 BY MR. GEBHARDT:

6 Q And nothing other than that,  
7 that's the only explanation?

8 MR. BURKE: Objection. He's  
9 answered the question.

10 BY MR. GEBHARDT:

11 Q Because it's in the realm of  
12 possibility?

13 A They asked me the question if  
14 that was a possibility, that it might become  
15 adversarial. And they were very nervous about  
16 anything that would be --

17 Q Was there any fact or feature  
18 about the upcoming negotiations that you can point  
19 to that led you to the conclusion that there might  
20 possibly be adversarial discussions or  
21 negotiations relating to the line of credit?

22 A I think what we're getting hung  
23 up on is the term adversarial which is --

24 Q Difficult negotiations.

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1 A -- maybe the term I guess that I  
2 sort of coined and maybe that's really not --  
3 you're getting hung up on. Not necessarily  
4 adversarial, but maybe difficult and, you know,  
5 because I thought that the company was not in as  
6 strong a financial condition as it had been the  
7 previous year, and so there's a possibility that  
8 the renegotiation of it might become more  
9 difficult, let's say.

10 Q You had not been represented, you  
11 meaning CCI, had not been represented by counsel  
12 in connection with the line of credit all the way  
13 up through December 31, 1999. Isn't that correct?

14 A I had an attorney look over, make  
15 some comments on the November note, made  
16 recommendations.

17 MR. BURKE: Again, let me just --  
18 counsel, let me just counsel the witness. Let's  
19 just leave it that you spoke with an attorney  
20 about the note. Let's not go into what the  
21 attorney told you or what your discussions were.

22 A Okay.

23 MR. BURKE: I think he's answered  
24 the question. Go ahead.

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1 MR. GEBHARDT: I don't think he  
2 finished answering when you interrupted him.

3 BY MR. GEBHARDT:

4 Q Other than that instance  
5 regarding the \$1.2 million loan, had the company  
6 been represented by counsel in connection with the  
7 other finances from Dauphin Deposit and then  
8 AllFirst?

9 A Represented in the negotiations  
10 or --

11 Q In connection at all.

12 A Looking over loan documents?

13 Q Did you use a lawyer?

14 A I don't believe so.

15 Q That's all I was asking.

16 A I don't believe that we did.

17 Q As the commitment letter  
18 indicates the loan approval was not -- excuse  
19 me --

20 A Which loan are we talking about?

21 Q The 1999 \$4 million line of  
22 credit commitment indicates that it was not  
23 subject to renewal until April 30th, 2000. Why  
24 did you feel the necessity to begin negotiations

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1 in February of that year?

2 A Well, I didn't in February. I  
3 wasn't planning on negotiating in February.

4 Q I thought you indicated the  
5 reason you called the meeting was to discuss the  
6 renewal or renegotiation of the line of credit and  
7 you needed counsel because there might be  
8 difficult discussions.

9 MR. BURKE: Objection to  
10 misstatement of prior statement.

11 A You're talking about the meeting  
12 on the 18th?

13 BY MR. GEBHARDT:

14 Q Yes.

15 A No. That meeting on the 18th was  
16 not to discuss, at least on my part, not to  
17 discuss the \$4 million line of credit. I wasn't  
18 there to discuss any of the notes. I called to  
19 talk to Craig Schwartz to go in and tell him  
20 that -- just what was going on with the company.  
21 One, that the project at Scott Air Force Base was  
22 still having some problems. Our claim was not  
23 going to be submitted when we thought it would be,  
24 that I had a meeting with the bonding company and

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1 Schwartz as we -- a practice we had always done,  
2 basically keep him informed what was going on with  
3 the company, what we were doing, so as I told --  
4 as I ended up telling a roomful of people, so they  
5 didn't hear something from somebody else, that  
6 they heard -- whatever the situation was they  
7 heard it from me.

8 Q I guess my question then still  
9 involves, if you were going to sit down with a  
10 banker and bring him up to date on what had been  
11 happening with a company, why was a lawyer  
12 accompanying you?

13 MR. BURKE: I'll object. I  
14 believe the witness has testified regarding the  
15 reason the lawyer accompanied him.

16 A I stated the circumstances under  
17 which he suggested that he come along.

18 BY MR. GEBHARDT:

19 Q I guess the transcript will bear  
20 us out. I understood you to say that you were  
21 about to enter into negotiations or you were going  
22 to begin negotiations about the line of credit.  
23 You thought there might be some difficulty or we  
24 will call it complex or whatever kind of issues

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1 that I had been talking to them about that project  
2 and another one in particular, and that I had a  
3 meeting coming up with them and that we were going  
4 to ask them to give us assistance on that project,  
5 which is all what I said in the meeting, though I  
6 was intending the meeting to be Craig Schwartz and  
7 Mike Zarcone. Instead as you stated, I walked  
8 into a roomful of people, two people on a  
9 conference phone, and so it was more of an  
10 inquisition than a meeting that I had set up.

11 Q You were the only party  
12 represented by counsel?

13 A Unless one of the other people  
14 there was an attorney or inhouse counsel, then I  
15 was the only -- he was the only attorney,  
16 possibly. I don't know for sure.

17 Q So I'm not confused about what  
18 you were calling a meeting for. That meeting was  
19 not to discuss or renegotiate the line of credit  
20 that CCI had?

21 A No.

22 Q It was just to review the  
23 company's finances and bring the bank current?

24 A Just to discuss with Craig

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1 you want, that you might need the assistance of  
2 counsel to address.

3 MR. BURKE: Objection.

4 MR. GEBHARDT: Let me finish what  
5 I'm saying first.

6 BY MR. GEBHARDT:

7 Q Therefore, you contacted Mr.  
8 Chernicoff at the recommendation of other counsel  
9 and he suggested to attend the meeting, but my  
10 understanding now you're telling me you were  
11 simply sitting down to bring the bank up to date  
12 with what had been happening at CCI.

13 MR. BURKE: Objection. Number  
14 one, there's no question pending -- and let me  
15 just finish my objection -- and I object to the  
16 mischaracterization on several facts as to the  
17 prior testimony. Counsel --

18 MR. GEBHARDT: I'm not trying to  
19 quote his prior testimony, but I'm confused --

20 MR. BURKE: Let's limit our  
21 questions to the facts and what was happening as  
22 opposed to what was previously testified to.

23 BY MR. GEBHARDT:

24 Q To clear up my confusion, it is

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1 your testimony that you did not meet with the bank  
2 on February 18, 2000, to discuss the terms of the  
3 revolving line of credit or its renewal or the  
4 loan documents pertaining to it, that was not your  
5 intention when you set the meeting up?  
6 A That's correct.  
7 Q But you nevertheless, based on  
8 the recommendation of your normal counsel, Eckert  
9 Seaman's, the day before the meeting, met with Mr.  
10 Chernicoff and at Mr. Chernicoff's suggestion had  
11 Mr. Chernicoff accompany you to the meeting with  
12 the bank?

13 MR. BURKE: Objection to the  
14 mischaracterization of the prior testimony.  
15 BY MR. GEBHARDT:

16 Q Is that what happened?

17 A The conclusion of my meeting here  
18 at Cunningham Chernicoff, I got ready to leave,  
19 Mr. Chernicoff, I had shown him the documents,  
20 acquired as to where I was going, I told him where  
21 I was going and why I was going there and he  
22 suggested -- asked if I was going by myself and I  
23 said yes and he suggested, if I wanted it might be  
24 good for him to tag along or come along. That was

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1 going to need more cash.

2 Q And had to come from the bank or  
3 bonding company?

4 A I didn't ask the bank for it.

5 Q Did you tell Mr. Schwartz that  
6 you expected CCI to have sustained a \$6 million  
7 loss for 1999?

8 A At the meeting or phone  
9 conversation?

10 Q Well, let's talk about the phone  
11 conversation prior to the meeting.

12 A I don't think so. I don't think  
13 I went into too many facts with Mr. Schwartz. I  
14 told him we were having some problems, I think. I  
15 told him we were going to have significant loss,  
16 certainly a loss for 1999, since we were unable  
17 to -- depending on whether he was able to  
18 recognize a claim, but I didn't go into too much  
19 detail because I wanted to meet with him face to  
20 says.

21 ---

22 (Whereupon the document was  
23 marked for identification as Exhibit Number 25.)  
24 ---

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1 it. So after thinking about it, I said there is  
2 no harm to be done, and I said fine.  
3 Q You knew prior to walking into  
4 the meeting with the bank that CCI was going to  
5 suffer substantial cash flow shortages over the  
6 next five to six months?

7 MR. BURKE: Objection to form. You  
8 can answer.

9 A I had received a recent cash  
10 flow -- worst case cash flow scenario which showed  
11 that we were going to have more serious cash flow  
12 problems in the future months and I took that  
13 information that I had received, I think I  
14 probably received it that morning.

15 BY MR. GEBHARDT:

16 Q This was Friday morning also?

17 A I think it was either Friday  
18 morning or the end of the day Thursday. Received  
19 the information, worst case scenario, but all the  
20 same it was still a scenario and it was -- I felt  
21 the need to inform the bank.

22 Q Tell them you needed more cash at  
23 that time?

24 A Basically a projection we were

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1 BY MR. GEBHARDT:

2 Q I've handed you Deposition

3 Exhibit 25 which I will represent to you are notes

4 taken by Mr. Jamin Gibson, the first page being

5 notes he made after the initial call to him from

6 Mr. Schwartz advising of the meeting and the

7 second page of notes and thereafter from the

8 meeting and times after the meeting. You'll

9 notice on the first page somewhere down around the

10 middle there's a reference to a \$6 million loss

11 for the year. My question would be, you had never

12 spoken to Mr. Gibson prior to February 18th?

13 A That's correct.

14 Q And if these are notes of Mr.

15 Gibson's conversation with Mr. Schwartz setting up

16 the meeting, the \$6 million figure would have had

17 to come from someplace. Isn't that right?

18 MR. BURKE: I'm going object to

19 the form of the question and the use of this

20 document. Are you asking --

21 BY MR. GEBHARDT:

22 Q I'm asking if it refreshes your

23 recollection as to whether you may have divulged

24 to Mr. Schwartz in setting up the meeting that you



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1 expected CCI's 1999 financial statements to show a  
2 \$6 million loss.

3 A I don't believe in the phone  
4 conversation that I represented to Craig Schwartz  
5 any loss figures for 1999. At the meeting that I  
6 had I believe I showed him the cash flow  
7 projection that showed a \$6 million cash flow  
8 shortfall somewhere in the course of the year  
9 2000. Also the \$6 million loss, we had already, I  
10 guess, somewhat indicated in November that we were  
11 looking at possibly a \$2 million loss for 1999.

12 Q Did CCI sustain a \$6 million  
13 operating loss for the fiscal year 1999?

14 A I don't believe so.

15 Q Apart from the cash flow  
16 statement, did you hand out any other statements  
17 at the meeting?

18 A Which meeting are you talking  
19 about?

20 Q February 18th.

21 A No.

22 Q Let me ask you, if you would, to  
23 look at Deposition Exhibits 22 and 23. Can you  
24 identify these documents?

15

1 think I gave them anything other than what I had,  
2 which was the cash flow statement.

3 Q But you do believe that at least  
4 after the Friday meeting that you would have sent  
5 the income statement and balance sheet that are  
6 Exhibits 22 and 23 to AllFirst?

7 A There were financial statements  
8 sent from -- I directed the CFO to send them  
9 whatever current financial information we had the  
10 beginning of the following week. So quite  
11 possibly these may have been contained in that.

12 Q Would you look at the second page  
13 of Deposition Exhibit 22? Would you agree that  
14 this financial statement shows a net loss after  
15 taxes of \$6,115,813.48?

16 A That's what it shows.

17 Q This would be for the annual year  
18 1999, and actually it's for a 13-month period  
19 ending January. So it's a 13-month statement  
20 rather than a 12-month statement?

21 A That is what it says at the  
22 bottom.

23 Q Is that a correct number?

24 A I couldn't say.

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1 A One is a balance sheet and one is  
2 an income statement.

3 Q And 22 would be the income  
4 statement and 23 the balance sheet?

5 A Yes.

6 Q Of CCI?

7 A Yes.

8 Q And these are company internally  
9 generated statements?

10 A Yes, they are.

11 Q Did you provide these to AllFirst  
12 on February 18th?

13 MR. BURKE: You, meaning CCI or  
14 Mr. Ortenzio?

15 MR. GEBHARDT: Mr. Ortenzio was  
16 there as a representative of CCI.

17 BY MR. GEBHARDT:

18 Q Did you provide these during the  
19 meeting?

20 A I don't believe so. I think the  
21 only thing that I provided was the cash flow  
22 statement. I believe that there were financial  
23 documents sent to them the beginning of the  
24 following week, but at the meeting there I don't

15

1 Q Well, did CCI sustain an  
2 operating loss in the magnitude of \$6 million for  
3 the year 1999?

4 A I don't know.

5 Q Well, you don't think they made a  
6 profit, do you?

7 MR. BURKE: The question was:  
8 Did they lose 6 million?

9 MR. GEBHARDT: Yes. I said in the  
10 magnitude of 6 million. If you want to say 5  
11 million 9 or 6 million 1.

12 BY MR. GEBHARDT:

13 Q Did CCI sustain a loss somewhere  
14 in the magnitude of the \$6 million indicated?

15 MR. BURKE: Do you know?

16 A I know we would have sustained a  
17 loss. Whether it was in the amount of \$6 million,  
18 I couldn't say.

19 BY MR. GEBHARDT:

20 Q Was it greater than 3 million?

21 A I really don't know. We never  
22 got a chance to really complete our first quarter  
23 financials.

24 Q Do you have any reason to believe



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1 that these numbers are inaccurate?

2 MR. BURKE: Objection to form.

3 BY MR. GEBHARDT:

4 Q Based on the company's records.

5 A I would have to say that probably  
6 our records were pretty good. So if that's what  
7 we internally generated, then I would say it was a  
8 high probability they would be close to being  
9 accurate. Only because in the past our  
10 information had been relatively accurate.

11 Q Turning to the balance sheet for  
12 the same period, would you agree, sir, that it  
13 shows CCI on Page 2 to be insolvent to the tune of  
14 \$995,762.87?

15 MR. BURKE: Objection to form.

16 A That was the negative equity.

17 BY MR. GEBHARDT:

18 Q So assuming the accuracy of these  
19 internally generated numbers as of the date, the  
20 13-month date of these statements, CCI was  
21 insolvent. Is that right?

22 MR. BURKE: Objection to the form  
23 of the question.

24 A Well, that depends. You're

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1 BY MR. GEBHARDT:

2 Q Which in laymen's terms shows CCI  
3 to be insolvent. Isn't that right?

4 MR. BURKE: Same objection. The  
5 witness can answer if he can.

6 A It shows negative equity of  
7 \$995,000.

8 Q In laymen's terms that means  
9 insolvent?

10 MR. BURKE: I'm going to object.  
11 The witness has answered the question. The  
12 document speaks for itself and the witness has  
13 already indicated the document provides what it  
14 provides.

15 BY MR. GEBHARDT:

16 Q Does it mean insolvent?

17 A I don't know. I would have to  
18 look further into -- I think it would require  
19 further investigation rather than a summary  
20 balance sheet.

21 Q You're not able to answer?

22 MR. BURKE: Based on the two  
23 documents that you've shown him, he says he's not  
24 able to answer.

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1 carrying a million, almost \$2 million of  
2 depreciation on this statement. So if you back  
3 that out --

4 BY MR. GEBHARDT:

5 Q We're not talking of an income  
6 statement where you can count depreciations as a  
7 deduction, used equipment that lost value over  
8 time, you don't add depreciation back in on the  
9 balance sheet.

10 MR. BURKE: We're not here to  
11 debate accounting principles. Let's let the  
12 witness answer.

13 A I only made the comment it shows  
14 \$2 million worth of the depreciation in arriving  
15 at the total. That's all. You can take that for  
16 what it's worth.

17 BY MR. GEBHARDT:

18 Q This statement shows CCI to be  
19 insolvent?

20 MR. BURKE: Objection to the  
21 form. The document speaks for itself. The  
22 witness can answer.

23 A It says what it says. It shows  
24 negative equity of \$995,000.

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1 BY MR. GEBHARDT:

2 Q How often did the company  
3 generate internal statements such as the ones that  
4 are Exhibits 23 and 24?

5 MR. BURKE: That's 22 and 23.

6 A Once a month.

7 BY MR. GEBHARDT:

8 Q And they were shown to you?

9 A I saw them.

10 Q And that would be each month  
11 during the 12-month period?

12 A For the most part, yeah.

13 Q So you were kept apprised of the  
14 financial situation of the company throughout the  
15 year on a current basis?

16 A Generally speaking.

17 Q Let me hand you what has been  
18 marked as Exhibit 24. Would I be correct that  
19 this is the cash flow projection that you handed  
20 out at the meeting on February 18th?

21 A I believe it is.

22 Q And this was prepared by CCI?

23 A Yes.

24 Q In handing this out to AllFirst

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1 you believed the numbers on there to be a  
2 reasonably accurate projection?

3 A I think they represented a worst  
4 case scenario.

5 Q But given the worst case scenario  
6 bent, they were still as reasonably accurate as  
7 CCI could make them?

8 A Probably, yes. We were trying to  
9 be accurate.

10 Q Would I be correct that the  
11 beginning cash balance shown on this projection  
12 for February is a negative \$6,205,366?

13 MR. BURKE: Objection to the form  
14 of the question. I believe the document speaks  
15 for itself.

16 MR. GEBHARDT: I understand that,  
17 but I would like to ask some questions about how  
18 numbers are derived.

19 BY MR. GEBHARDT:

20 Q That's what it shows?

21 A Yes, that's what it says.

22 Q That means that CCI had a hole in  
23 its cash of that sum of money, had less --  
24 generated that much less cash -- let me rephrase

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1 that.

2 The beginning cash balance was  
3 negative of \$6,205,366, which I think you've just  
4 indicated.

5 MR. BURKE: That's what the  
6 document indicates.

7 MR. GEBHARDT: Exactly.

8 BY MR. GEBHARDT:

9 Q The ending cash balance was  
10 projected for February to be \$9,063,691. Do you  
11 see that?

12 A Yes.

13 Q And taking the full \$4 million  
14 revolving line of credit and the full \$1.2 million  
15 temporary line, that still left CCI as of the end  
16 of February according to this projection with a  
17 negative cash number of \$3,863,691. Is that  
18 right?

19 MR. BURKE: Is this indicated  
20 somewhere on the document, Counsel?

21 MR. GEBHARDT: Yes, at the very  
22 bottom, it says cash shortage.

23 A That's what it says.

24 BY MR. GEBHARDT:

16

1 Q What that means, if I'm

2 understanding this projection correct, the company

3 projected that for the month of February fully

4 using the \$4 million revolving line of credit and

5 the \$1.2 million loan that it would come up short

6 in paying its bills by over \$3,800,000?

7 MR. BURKE: Are you asking if

8 that is what it says?

9 BY MR. GEBHARDT:

10 Q Is that what the company's

11 projection was?

12 A That's what this projection says,

13 yes.

14 Q But, of course, as of the end of

15 February, the company did not have an available

16 line of credit of \$5.2 million, did it?

17 A No, by the end of February it had

18 4 million.

19 Q So, in fact, as of the end of

20 February, that 3,863,691 negative number would

21 have been \$1.2 million higher?

22 MR. BURKE: I'm going to object

23 to the form. I'm not sure where you're reading

24 from. Are you asking what this document says?

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1 BY MR. GEBHARDT:

2 Q I'm saying this document projects

3 they had available the full \$4 million line of

4 credit and the full \$1.2 million line of credit as

5 of the end of February, but, in fact, the 1.2

6 million had been repaid.

7 MR. BURKE: I object. That's not

8 what the document says.

9 MR. GEBHARDT: You're not

10 testifying and the witness certainly can explain

11 the numbers.

12 BY MR. GEBHARDT:

13 Q My question is because the \$1.2

14 million had been repaid in the middle of February,

15 shouldn't the 3,863,691 be increased by a million

16 two?

17 A Well, if you add the -- or you

18 subtract 1 million 2 from 3.8, that would bring

19 you to the number you're looking for.

20 Q You add it to the 3.8.

21 A Well, add it, yes, you would add

22 it.

23 Q So that would show a deficit of

24 approximately \$5 million as of the end of February

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1 of CCI's available cash to pay its operating  
2 expenses.

3 MR. BURKE: Objection to the  
4 mischaracterization of what the document says.

5 A If you apply the math you're  
6 doing it, yes.

7 BY MR. GEBHARDT:

8 Q And those cash shortages  
9 continued all the way through July and into where  
10 it says remaining. Right?

11 A Yes, according to this  
12 projection.

13 Q According to the projection, and  
14 at the end the projection was \$5,900,000 was going  
15 to be CCI's shortfall in available cash to pay its  
16 operating expenses?

17 A No. I think it says 1 million 9,  
18 but I think you're getting 5 million 9 if you add  
19 the cash shortages.

20 Q You presented this cash flow  
21 projection, you said, at the meeting on the 18th.  
22 Right?

23 A Yes, I believe I did.

24 Q In the course of that meeting,

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1 the bank on the 18th that the internal statements  
2 of CCI were showing a loss approximating \$6  
3 million for 1999, weren't you?

4 A I'm not sure if I knew it was \$6  
5 million or not, to tell you the truth. I knew  
6 this is what this was, this is what I had  
7 received, what I had looked at and what I gave to  
8 them.

9 Q These weren't generated this  
10 succeeding week. They were available to you the  
11 week you made the meeting with the bank. Right?

12 MR. BURKE: Are you asking when  
13 Exhibit 24 was generated?

14 BY MR. GEBHARDT:

15 Q I think you indicated earlier in  
16 your testimony that they were sent to the bank the  
17 week after the meeting on the 18th.

18 A I don't believe I had those in my  
19 possession at the time of my meeting on the 18th.  
20 I believe they were sent to the bank subsequent to  
21 the 18th.

22 Q I understand that. My question  
23 was, did you have an awareness that CCI's  
24 financial position was approximated what's

167

1 you had seen the interim financial statements of  
2 CCI that were generated monthly and shown to you  
3 as president?

4 A No, I don't believe I had seen  
5 those. This is what I was looking at or had  
6 received and I had this. I don't believe I had  
7 those as yet.

8 Q You would have had not  
9 necessarily Exhibits 22 and 23, but you would have  
10 had a 12-month statement ending December 31, 1999,  
11 wouldn't you?

12 A I think the 12-month one we had  
13 was more in line with a 9-month one we had had  
14 before.

15 Q All of a sudden a 13-month one is  
16 generated, now showing \$4 million more of loss?

17 A Well, actually, between the 11th  
18 and the meeting on the 18th, there was -- we  
19 revised -- a lot of projections got revised. The  
20 claim for Scott Air Force Base and the prison  
21 project, I think, were removed and with the  
22 removal of those, the projections took a wild  
23 swing to the negative.

24 Q You were aware when you met with

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1 reflected on Exhibits 22 and 23 when you met with  
2 the bank?

3 A On the 18th, I knew with the  
4 removal of the Scott Air Force Base claim that it  
5 was going to change projections significantly.

6 Q Did you quantify what you  
7 believed the projections would be changed to?

8 A It would change by the amount of  
9 the claim which was about 4.5 or 4.6 million.

10 Q Did you express all that to the  
11 bank?

12 A In the meeting with the bank I  
13 told them that with the claim, both the one at  
14 Scott Air Force Base and the \$2.5 million claim at  
15 the other project that at the end of the day, all  
16 the notes could be paid off.

17 Q Assuming those receivables were  
18 collected?

19 A Assuming that those claims were  
20 successful, yes.

21 Q You had no prospect of getting  
22 them paid in February, did you?

23 A No. We had hoped the claim would  
24 have been submitted and negotiated February or

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1 March, but some problems developed that prevented  
2 the claim from being submitted, which was the  
3 reason for the significant change in the financial  
4 outlook.

5 Q Did you send a copy of Exhibit 24  
6 to the bonding company?

7 A They probably had access to it.  
8 When, sent it to them when?

9 Q For the meeting with the bank.

10 MR. BURKE: Before the 18th?

11 MR. GEBHARDT: Yes.

12 A Before the 18th? No, couldn't  
13 have because I had just gotten these presented to  
14 me just prior to the day of the meeting at the  
15 bank. I don't believe they could have been.

16 MR. GEBHARDT: Let's mark this as  
17 Exhibit 26.

18 (Whereupon the document was  
19 marked for identification as Exhibit Number 26.)

20 ---

21 MR. BURKE: Before we do that,  
22 Counsel, it is now 6:00. I have a request that we  
23 try to wrap this up in a half hour.

24 MR. GEBHARDT: For the record,

17

1 late in the day they handed me, the night before  
2 or that morning.

3 Q But there was a meeting scheduled  
4 with the bonding company for the 23rd. Isn't that  
5 correct?

6 A The 23rd or the 25th. We had a  
7 meeting in Harrisburg at the bonding company on  
8 the 23rd, and I had a follow-up meeting on the  
9 25th in Baltimore.

10 Q Mr. Gibson's notes, to the extent  
11 they are a basis to refresh your recollection, has  
12 St. Paul USF&G meeting on Tuesday, 2/22nd. Would  
13 it be fair to say there was a meeting scheduled  
14 with USF&G for the succeeding week on or about  
15 Tuesday?

16 A Yes. I informed them of that.  
17 That meeting, I believe, was in Harrisburg. The  
18 one on the 23rd was in Harrisburg.

19 Q You don't know whether you gave  
20 them the cash flow projection before or after the  
21 bank's meeting?

22 A It would have had to have been  
23 after the bank meeting.

24 Q Exhibits 22 and 23 indicate in

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1 I'm going to ask the questions I have to ask and I  
2 don't expect -- I would hope to be done by then,  
3 but if I'm not, I'm not. I'm within the time  
4 frame set by Federal Rules and that's all I can  
5 say.

6 MR. BURKE: Let's see where we  
7 are in a half hour.

8 BY MR. GEBHARDT:

9 Q Deposition Exhibit 26, Mr.

10 Ortenzio, appears to be a letter sent by David,  
11 Dominiani, D-O-M-I-N-I-A-N-I, by Shane Miller,  
12 Executive Vice President, relating to work in  
13 process. Did you distribute a copy of this  
14 Exhibit 26 at the meeting at AllFirst?

15 A I'm not sure. It's possible.

16 Q Did you send to the bonding  
17 company the cash flow projections at or about the  
18 18th?

19 A These probably were sent to the  
20 bonding company.

21 Q You don't know if it was before  
22 or after the meeting with AllFirst?

22 A It would have had to be after  
24 because they had just been generated. It would be

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1 the top right-hand corner that these exhibits were  
2 generated on February 14th, 2000. Take a look at  
3 them.

4 A I don't have them anymore. Which  
5 ones are they?

6 Q Exhibits 22 and 23. Do you see  
7 that?

8 A Okay. What are we looking at?

9 Q Exhibits 23 and 23 in upper  
10 right-hand corner appears to be an indication that  
11 they were generated on February 14, 2000 at 2:05  
12 in the afternoon, if I'm reading military time  
13 correctly. Do you see that?

14 A Yes, I see it.

15 Q And would they have been  
16 presented to you after being generated?

17 MR. BURKE: As opposed to before  
18 they were generated?

19 BY MR. GEBHARDT:

20 Q What I am saying -- what I want  
21 to know is did you see these before you met with  
22 the bank?

22 A Before I met with the bank on the  
24 18th?



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1 Q Yes.

2 A I don't know if I reviewed these  
3 prior to meeting with the bank or not. I don't  
4 have any exact recollection.

5 Q Is it likely you would have seen  
6 them before the meeting with the bank?

7 MR. BURKE: I'll object. Asked  
8 and answered. You can go ahead and answer it  
9 again.

10 A It seems to me at that particular  
11 time of that week, I was more interested in cash  
12 flow projection. So this report was probably  
13 generated and being looked over. Generally, I'll  
14 get those reports a couple days after they've been  
15 printed.

16 BY MR. GEBHARDT:

17 Q I think you indicated the cash  
18 flow projection, which is 24, wasn't given to you  
19 until the 18th or the day before.

20 A The 17th, yes, that's true.

21 Q These appear to have been  
22 generated on the 14th, which is four days earlier.  
23 So even if you were focusing on cash flow, is  
24 there any reason you wouldn't have looked at

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1 generated?

2 A Probably not on the 14th,  
3 probably a day or so later. Usually, I think,  
4 they were reviewed for any corrections or anything  
5 that needed to be added or deleted before they  
6 were actually then distributed. So actually, the  
7 run date doesn't necessarily mean the date that I  
8 laid my eyes on them.

9 Q But it is likely you saw these  
10 before you met with AlIFirst on the 18th?

11 MR. BURKE: Objection.

12 A It's possible. I don't  
13 independently recall. Had I, I probably would  
14 have taken them with me and given it to them. So  
15 if I gave it to them, that would have been an  
16 indication that I had reviewed it

17 ---

18 (Whereupon the document was  
19 marked for identification as Exhibit Number 27.)

20 ---

21 BY MR. GEBHARDT:

22 Q Do you recognize your signature  
23 on Exhibit 27?

24 A Yes.

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1 these?

2 MR. BURKE: Objection. He's  
3 asked and answered as to whether or not he  
4 remembers seeing these documents prior to the  
5 meeting on the 18th. He can answer it again.

6 MR. GEBHARDT: Why don't you say  
7 objection rather than try to coach and say answer  
8 what you've already said.

9 MR. BURKE: I'm not trying to  
10 coach.

11 MR. GEBHARDT: As long as you say  
12 objection, that covers all your form of  
13 objections. You don't need to make a statement  
14 each time.

15 MR. BURKE: My objection is to  
16 reasking questions numerous times.

17 MR. GEBHARDT: I understand. You  
18 said that. Make your objection, please just say  
19 objection and that covers the record for me.

20 MR. BURKE: What's the question  
21 pending?

22 BY MR. GEBHARDT:

23 Q Is it likely that you would have  
24 seen these on or about the 14th when they were

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1 Q Would it be fair to say this is a  
2 letter sent by you on behalf of CCI Construction  
3 requesting CCI's customers to send payments  
4 directly to USF&G?

5 A That is what the letter states.  
6 However, it wasn't sent on that date, nor was it  
7 signed on that date.

8 Q Do you know when it was sent?

9 A It was signed on February 25th  
10 and it was released on March the 6th, I believe,  
11 or thereabouts.

12 Q Do you know why it's dated  
13 February 22nd?

14 A Yes.

15 Q Why?

16 A The bonding company wanted it  
17 backdated to the date the bank swept the account.

18 ---

19 (Whereupon the document was  
20 marked for identification as Exhibit Number 28.)

21 ---

22 BY MR. GEBHARDT:

23 Q Exhibit 28 is a letter from an  
24 attorney from Duane, Morris & Heckscher to



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1 customers of CCI. Were you aware of this letter  
2 going out?

3 A I received a copy of it.

4 MR. BURKE: There's a series of  
5 letters to 28.

6 MR. GEBHARDT: That's correct.

7 A I believe this was a letter  
8 basically trying to redirect any potential that  
9 there would be funds sent directly to AllFirst  
10 since the bank was sweeping the account, so there  
11 was a scrambling on USF&G's part to get letters  
12 out to hopefully avoid anybody accidentally  
13 sending any money directly into the CCI account.  
14 BY MR. GEBHARDT:

15 Q The top of the second paragraph  
16 on the first page of the first letter carries on  
17 throughout all the letters says, quote, CCI has  
18 admitted to USF&G that it is financially unable to  
19 complete work under its contract with -- and then  
20 the statement of each customer's name -- and CCI  
21 is unable to pay labor and material subcontractors  
22 and suppliers whose work and materials were used  
23 on or incorporated in the project, period, end  
24 quote. Is that a true statement?

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1 A Not necessarily, but that was  
2 what they directed their attorneys in the letters  
3 to send.

4 Q Did CCI admit to USF&G as of  
5 February 24, 2000, it was financially unable to  
6 complete the work under its contracts with various  
7 customers?

8 A No.

9 Q That's not a true statement?

10 A No.

11 Q Were you aware that USF&G was  
12 sending out these letters on or about the 24th of  
13 February?

14 A No, I don't believe that letter  
15 actually went out the 24th. It was like the other  
16 letters, I think it was dated the 24th, but it  
17 wasn't mailed until a period of time afterwards.  
18 And I didn't author the letter nor draft it, so I  
19 really can't speak to their content of it.

20 Q Did a meeting occur on February  
21 22nd, 2000, with the bonding company?

22 MR. BURKE: February 22nd?

23 A February 22nd?

24 BY MR. GEBHARDT:

1 Q I think that's when the notes of  
2 February 18 indicated --

3 A It was either the 22nd or the  
4 23rd that representatives from the bonding company  
5 were in our office in Mechanicsburg.

6 Q What was the substance of the  
7 discussions at the meeting with the bonding  
8 company?

9 A They were reviewing project  
10 records trying to -- they were meeting with our  
11 personnel to gather information on the projects as  
12 a prelude to my meeting with the bonding company  
13 on the 25th. So they were, for the most part, in  
14 and going over current job status reports, numbers  
15 23rd, 24th or 22nd or 23rd, as a preparation for  
16 the meeting we were going to have on the 25th.

17 Q Did that meeting on the 25th  
18 occur?

19 A Yes.

20 Q Where did it occur?

21 A In Baltimore.

22 Q Who was in attendance?

23 A Well, there was initially myself,  
24 various individuals from St. Paul and for a cameo

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1 appearance Jerry Elias, and I believe yourself.

2 Q And the bank declared CCI in  
3 default as of that meeting?

4 A Prior to that meeting.

5 Q Prior to the meeting. What was  
6 the bonding company's position with respect to CCI  
7 and that meeting?

8 A Well, the meeting had been  
9 originally set up to try to work out the problems,  
10 identify where the problems were and to try to  
11 develop some kind of recovery plan.

12 Q And I take it that was  
13 unsuccessful, the result of the meeting?

14 A Well, there was an attempt to try  
15 to work with the bank also. However, when the  
16 bank took the action that they did, it kind of  
17 changed the tenor of the meeting and what the  
18 possibilities were. So we never were able to  
19 truly work out a recovery plan, so the meeting  
20 ended at the end of the day somewhat  
21 inconclusively.

22 Q Were you aware of the loss USF&G  
23 sustained as a result of CCI's bonds?

24 A At the end of the day, you mean,

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1 when all was said and done?

2 **Q As of today.**

3 **A Yes, as of today.**

4 **Q What magnitude is there?**

5 **A They're representing**

6 approximately a \$32 million loss.

7 **Q During the meeting with the bank**

8 on February 18th, did you disclose to anyone that

9 the \$1.2 million had been repaid by a draw on the  
10 line of credit?

11 **MR. BURKE: Objection to form.**

12 You can answer.

13 **A My statement in that meeting was**

14 in response to the question, was it had been

15 repaid, the company had repaid.

16 **BY MR. GEBHARDT:**

17 **Q Did you tell anyone that by**

18 repaying the loan it was done with a draw on the  
19 line of credit?

20 **MR. BURKE: Same objection.**

21 **A My words were to ask if it had**

22 been repaid, and I said that the company, CCI, had

23 repaid the note.

24 **BY MR. GEBHARDT:**

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1 understanding of what CCI's financial condition

2 was as is reflected on the two financial

3 statements that are Exhibits 22 and 23 and the

4 cash flow statement that is Exhibit 24?

5 **MR. BURKE: Objection to form.**

6 **A No.**

7 **BY MR. GEBHARDT:**

8 **Q Completely unaware?**

9 **A I'm responding to your question,**

10 specifically your question.

11 **Q You had no general understanding**

12 when you --

13 **A That wasn't your question.**

14 **Q I think it was.**

15 **MR. BURKE: It wasn't.**

16 **BY MR. GEBHARDT:**

17 **Q Let me ask it again. When you**

18 made the payment on behalf of CCI on February 11,

19 2000, did you have a general understanding that

20 the financial condition of CCI was similar to

21 what's reflected in Exhibits 22, 23 and 24?

22 **A And my answer was no. The**

23 financial condition of the company was not to that

24 degree. It wasn't as bad as those numbers

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1 **Q But you didn't give any**

2 explanation beyond that?

3 **A I think someone asked -- I think**

4 I said with a check drawn out of our account or

5 something to that effect.

6 **Q When you made the payment on**

7 February 11th, were you aware of the financial

8 circumstances of the company?

9 **A At that time, that point in time?**

10 **Q Yes.**

11 **A Generally.**

12 **Q And were you aware of the**

13 financial circumstances of the company that were

14 reflected on the interim financial statements

15 which are Exhibits 22 and 23 and the cash flow

16 projection which I believe is Exhibit 24?

17 **MR. BURKE: Objection to form.**

18 ---

19 (Whereupon the court reporter

20 read back the pertinent testimony.)

21 ---

22 **BY MR. GEBHARDT:**

23 **Q When you made the payment on**

24 February 11, 2000, did you have a general

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1 represent.

2 **Q And in one week did it turn that**

3 bad?

4 **MR. BURKE: Objection to form.**

5 You can answer.

6 **A I think in one week there was a**

7 different scenario run with the removing of the

8 claims that we had hoped to get. I think there

9 were some other impacts on a job or two which had

10 been unanticipated with respect to some additional

11 problems or delays. And so when the numbers were

12 rerun, and this is what they were rerun to, it

13 presented a much worse situation financially for

14 the company than what we had been carrying prior

15 to them or what I had been aware of prior to that.

16 **Q You knew when you made the**

17 payment that CCI's financial condition was not a

18 good financial condition, didn't you?

19 **A Good as compared to what? You**

20 already asked me how it was in comparison to what

21 it was in November.

22 **Q When you made the payment on**

23 February 11th, you knew CCI was going to lose

24 money for the preceding fiscal year?

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1 A I knew we were going to lose  
2 money. I did not know we were going to lose money  
3 to the extent -- even to this projection here or  
4 this financial report here.

5 Q When you made the payment on  
6 February 11th on behalf of CCI, you understood CCI  
7 or had a general appreciation that CCI was going  
8 to sustain cash flow shortages, shortfalls?

9 A I had a general understanding  
10 that we were -- my understanding at that point in  
11 time was that we were not out of the woods,  
12 certainly, with respect to our cash flow problems,  
13 but you're referring to the magnitude and the  
14 magnitude presented with these numbers was not  
15 known to me on February 11th.

16 Q But you knew still there was a  
17 problem?

18 MR. BURKE: Objection to form.

19 A Well, you know, problem, give me  
20 something in order of magnitude.

21 MR. BURKE: Can you define  
22 problem?

23 A Problem compared to --  
24 BY MR. GEBHARDT:

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1 Q A Difficulty -- you  
2 understood when you made the payment, CCI was  
3 anticipating having cash shortages over the  
4 succeeding months?

5 A We were still going to have some  
6 cash flow problems in the future months. Now the  
7 magnitude, in my estimation, was not to the degree  
8 that Exhibits 22, 23 and 24 projected.

9 MR. GEBHARDT: That's all I have.  
10 (The deposition concluded at 6:25 p.m.)

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# 1 CERTIFICATE

2  
3 I, DONNA L. CROSSAN, a  
4 Reporter Notary-Public and Certified Shorthand  
5 Reporter of the State of Pennsylvania, do hereby  
6 certify that prior to the commencement of the  
7 examination, JOHN M. ORTENZIO was duly sworn by me  
8 to testify the truth, the whole truth and nothing  
9 but the truth.

10 I DO FURTHER CERTIFY that the  
11 foregoing is a true and accurate transcript of the  
12 testimony as taken stenographically by and before  
13 me at the time, place and on the date hereinbefore  
14 set forth, to the best of my ability.

15 I DO FURTHER CERTIFY that I  
16 am neither a relative nor employee nor attorney  
17 nor counsel of any of the parties to this action,  
18 and that I am neither a relative nor employee of  
19 such attorney or counsel, and that I am not  
20 financially interested in this action

21 -----  
22 Notary Public of the State of Pennsylvania

23 Dated:

24 -----

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# 1 LAWYER'S NOTES

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DATE	INVOICE	DESCRIPTION	AMOUNT
02/11/00	021100	ACCT #0001-1828-0102598-0200	1200000.00
		TOTALS:	1200000.00

Exh B.

CCI CONSTRUCTION CO., INC.

CCI CONSTRUCTION CO., INC.  
2500 OLD GETTYSBURG ROAD  
CAMP HILL, PA 17011

DAUPHIN DEPOSIT BANK  
HARRISBURG, PA

0060628

60-83  
313

CHECK NO.	DATE	AMOUNT
00628	2-11-00	***1200000.00

PAY ONE MILLION TWO HUNDRED THOUSAND DOLLARS AND 00 CENTS

TO THE  
ORDER  
OF

ALLFIRST BANK  
3045 MARKET STREET  
CAMP HILL, PA 17011

~~NON-NEGOTIABLE~~

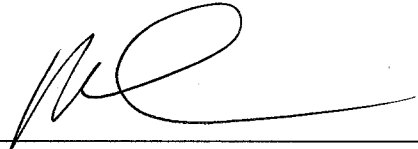
CCI CONSTRUCTION CO., INC.

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**CERTIFICATE OF SERVICE**

Robert A. Burke, attorney for Defendant, John Ortensio, hereby certifies that he caused a true and correct copy of Defendant's Memorandum of Law in Support of his Motion for Summary Judgment to be served upon the following on this 22nd day of May, 2002, by Federal Express Next Day Delivery:

Lawrence Gebhardt, Esquire  
Gebhardt & Smith, LLP  
The World Trade Center, Ninth Floor  
Baltimore, MD 21020-3064

  
\_\_\_\_\_  
ROBERT A. BURKE, ESQUIRE